REPORTS
AND
CASES,
COLLECTED BY THE LEARNED,
SIR JOHN POPHAM,
KNIGHT,
Late LORD CHIEF-JUSTICE
OF
ENGLAND.

Written with his own hand in *French*, and novv faithfully Tranſlated into Engliſh.

To which are added ſome Remarkable CASES Reported by other Learned Pens ſince his death.

With an Alphabeticall Table, wherein may be found the Principall Matters contained in this Booke.

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TO THE READER.

Courteous Reader,

ALbeit the name of the Compiler of the greateſt part of the enſuing REPORTS (for *Denominatio ſit a parte majori & meliori*) would be a ſufficient invitation to any underſtanding Reader, not only to caſt his Eye upon, but ſeriouſly to peruſe them; yet becauſe theſe two Queſtions may (and no doubt will, and that upon good ground) be made: as, 1. Why they ſhould lye ſo long in private hands, vvithout being expoſed to the publique vievv? 2. Why they ſhould be now Printed?

To the firſt I anſwer, That by the handſome compoſure and connexion of them, it may (and that very probably) be conjectured, that the honourable Compiler at firſt intended them for the publique, but they (after his death) comming into private hands, they who became poſſeſſors of them, did rather intend their owne, and their friends private knowledge and advantage by them, then to let others communicate therein, for it hath not formerly been (neither yet is) a thing unuſuall, for the great and learned Profeſſors of the Law, to ingroſſe into their owne hands, the beſt and moſt authentick REPORTS, for their better help, credit, and advantage in the courſe of their practiſe, which being unknown to other men, they cannot upon ſudden occaſions, be ready to make anſwer thereun-

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to; and that might be the reaſon why they have not been as yet publiſhed.

To the ſecond I anſwer, that the Copy (out of which this Tranſlation was made) comming out of the Library of a reverend and Learned Sergeant at Law now deceaſed, and ſaid therin to be written with the proper hand-writing of the Lord POPHAM (a good ground to conceive that it was Authentick) the Gentleman in whoſe hands it was, was earneſtly importuned for the Copy, that ſo it might be made publique, to whoſe importunity there was at laſt a condeſſention, ſo as ſuch due care might be taken both in the Tranſlation and Printing, as not to prejudice the Author, or the matter therein contained: And whether that condition be fully performed, ſhall be now left to the candid interpretation of the judicious Reader, who cannot but know that ſome *Errata's* (let the Printer or Correcter be never ſo carefull) will follow the Preſſe; but it is hoped that nothing materiall or ſubſtantiall is committed or omitted to the prejudice of the Work, or of the Compiler thereof. There is an addition of ſome later Caſes in the time of King JAMES, and the late King CHARLES, which were taken by judicious Pens, as will evidently appear by the Caſes themſelves; and I dare ſay, that whoever reads them, will neither think his Time or Money miſpent, they being ſuch as are well digeſted, and very practicall. I ſhall adde this one thing more, that the principall end of this Edition is, the advancement of knovvledge, and to impart the good thereof to thoſe who heretofore vvanted vvhat is hereby made publick, vvhich may (peradventure) be a means to invite others more learned to publiſh other things of the like nature, for the benefit of Students, and Profeſſors of the Lavv.

The

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CASES
Reported by
Sr. JOHN POPHAM Knight,
Lord chief Justice of *ENGLAND*,
In the time of Queen *ELIZABETH*; and written with his own hand in *French*, and now faithfully done into *English*: to which are added some remarkable CASES, Reported by other Learned, and Judicious Pens, since his death.

Fenner *versus* Fisher.

Mich. 34. and 35 *Eliz. Regine*, in the Kings Bench.

IN Trespasse brought by Justice Fenner against Fisher, &c. for breaking his Close, &c. the Defendant pleads that one Sir Thomas Cornwallis was seised in his Demesne as of Fee of the Manor of Stanstead in the County of Kent, &c. and by Deed by the Statute of 27 H. 8. granted that one Thomas Wright should stand seised of the Manor aforesaid to the use of the said Wright for the term of his life, the remainder to the use of the said Cornwallis and his heirs; by vertue of which Deed the said Wright entred into the Land, and was thereof seised for the term of his life, and that the said Wright died seised, and that the said Cornwallis entred as in his Reversion, and was thereof seised in his Demesne as of Fee, and that he granted the Reversion to the Defendant, and that he entred as in his Reversion, and was thereof seised in his Demesne as of Fee, and that the Plaintiff entred upon the Defendant, and him disseised, wherefore he entred upon the Plaintiff, and him disseised, as he lawfully might for the cause aforesaid, which is the same Trespasse, &c. The Plaintiff replies by protestation, that the said Wright died not seised as the Defendant hath alledged: And for Plea saith, that the said Wright did not leave to the Defendant, as the Defendant hath alledged, whereby the Plaintiff saith he ought to have had the Land, and that Judgment ought to be given for the Plaintiff, because that he hath not made any Title by his Replication, &c. To which Plea of Traverse the Defendant pleads in Bar, that the Plaintiff ought not to be admitted to traverse the Title of the Defendant, because that the Plaintiff in his Bill of Complaint in Chancery, whereupon the Writ of Subpœna was awarded, hath confessed, that he needs not to make Title in the Court of Chancery to recover the Land without making a Title; and therefore the Plaintiff ought not to be admitted to traverse the Title without making a Title in his Replication: And this is the same Title which the Plaintiff hath confessed by the Bill aforesaid, that he needs not to make in the Court of Chancery, and therefore he

for whose life it was, was dead, upon which he entred, and it is adjudged that it sufficeth for the Plaintiff to maintain that Cethy & vic was yet living without making any other Title: And yet these reasons Clench and Gawdy held the Replication good, to which Popham said, that we as Justices ought not to adjudge for the Plaintiff where a good & formall bar is pleaded as here it is. But whereby the Record it self which is before us, we cannot see that the Plaintiff hath good cause of Action: And therefore I agree that in Trespasse in some cases the Plaintiff may traverse the Bar, or part of it, without making any other Title then that which is acknowledged to the Plaintiff by the Bar, but this alwaies ought to be where a Title is acknowledged to the Plaintiff by the Bar, and by another means destroy by the same Bar, for there it sufficeth the Plaintiff to traverse that part of the Bar which goeth to the destruction of the Title of the Plaintiff comprised in the Bar, without making any other Title, but if hee will traverse any other part of the Bar, he cannot do it without making an especiall Title to himself in his Replication, where by the Bar the first possession appeareth to be in the Defendant, because that although the Traverse there be found for the Plaintiff, yet notwithstanding by the Record in such a Case the first Possessions will yet appear to be in the Defendant, which sufficeth to maintain his Regresse upon the Plaintiff, and therefore the Court hath no matter before them in such a Case to adjudge for the Plaintiff, unlesse in cases where the Plaintiff shews a speciall Title under the Possession of the Defendant; As for example, In trespasse for breaking of his Close, the Defendant pleads that J. G. was seised of it in his Demesne as of fee, and enfeoffed J.K. by virtue of which he was seised accordingly, and so being seised, enfeoffed the Defendant of it, by which he was seised, untill the Plaintiff claiming by colour of a Deed of Feoffment made by the sayd J.G. long before that he enfeoffed J. K. (where nothing passed by the sayd Feoffment) entred, upon which the Defendant did re-enter, here the Plaintiff may well traverse the Feoffment supposed to be made by the sayd J. G. to the sayd J. K. without making Title, because that this Feoffment only destroies the Estate at will made by the sayd J. G. to the Plaintiff, which being destroyed he cannot enter upon the Defendant, albeit the Defendant cometh to the Land by Disseisin, and not by the Feoffment of the sayd J. K. for the first Possession of the Defendant is a good Title in Trespasse against the Plaintiff, if he cannot [illegible] a Title Paramount. But the Feoffment of the sayd J. G. being traversed and found for him, he hath by the acknowledgment of the Defendant himself a good Title against him, by reason of the first Estate at will acknowledged by the Defendant to be to the Plaintiff, and now not defeated: But in the same case he cannot traverse the Feoffment supposed to be made to the sayd J. K. to the Defendant, without an especiall Title made to himself; for albeit that J. K. did not enfeoff the Defendant, but that the Defendant disseised him, or that he cometh to the Land by another means, yet he hath a good Title against the Plaintiff by his first Possession, not destroyed by any Title Paramount, by any matter which appeareth by the Record; upon which the Court is to adjudge; and with this accord the opinion of 31 E. 4. 1. That the materiall matter of the Bar ought alwaies to be traversed, or otherwise that which upon the pleading is become to be materiall, and that which the Plaintiff traversed here, to wit, the Lease made by Wright to the Defendant is the materiall point of the Bar which destroyeth the Title Paramount acknowledged to the Plaintiff by the colour given in the Bar which is good without another Title made: Who note well the diversity where in pleading in Trespasse the first Possession is acknowledged in the Plaintiff by the Bar, and where it appeareth by the pleading to be in the Defendant, and where, and by what matter the first Possession acknowledged in the Plaintiff by the Bar is avoided by the same Bar; And upon this, Judgment was given for the Plaintiff, as appeareth in 34. and 35. Eliz. Rol.

Earl of *Bedford*, versus *Eliz. & Anne Russell*.

Mich. 34. and 35. *Eliz.*

In the Court of Wards.

2. IN the Court of Wards, the Case was thus, between the new Earl of Bedford, and Elizabeth and Anne the Daughters and Heirs of John, late Lord Russell, which was put ten times to all the Justices to be resolved: Francis late Earl of Bedford, was seised of the Manors of Barnake, Chaldon, &c. in Comitatu Dorset, in his Demesne as of fee, and so seised the fourth year of Queen Eliz. of it enfeoffed the Lord St. John of Bletsoe, and others in fee, to the use of himself for forty years, from the day of the said Deed; and after to the use of the said John then his second Son, and the Heirs Males of his body; and for default of such Issue, then to the use of the right Heirs of the said Earl the Feoffer for ever: Afterwards Edward Lord Russell Son and Heir apparent to the said Earl died without Issue, and after the said John Lord Russell died without Issue Male, having Issue the said two Daughters, afterwards to wit 27 Eliz. the said Francis Earl of Bedford, by Indenture made between him and the Earl of Cumberland and others in consideration of the advancement of the Heirs Males of the body of the said Earl, which by course of descent should or might succeed the said Earl, in the name and dignity of the Earldome of Bedford, and for the better establishment of his Lordships, Manors and Hereditaments, in the name and blood of the said Earl; determined and granted with the said Covenantees, that he and his Heirs thereafter shall stand seised of the said Manors (amongst others) to the use of himself for life, without impeachment of Waste, and after his decease to the use of Francis the Lord Russell, and the Heirs Males of his body, & for default of such Issue, to the use of Sir William Russell Knight, his youngest Son, and the Heirs Males of his body, with diverse Remainders over: after which the said Francis, Lord Russell died, having Issue Edward the now Earl of Bedford, and after this the said Francis late Earl of Bedford died also, and after the Daughters of the said John Lord Russell, as the now Earl of Bedford, shall have these Manors of Barnake, &c. Now the question, and upon this it was argued by Cook, Solicitor and others, for the Daughters, that an use at Common Law, was but a confidence put in some to the benefit and behoof of others, and this Confidence was to give remedy, but for those for whose benefit the confidence was, and that was in this Case, for the said Daughters which were the right Heirs to the said Francis late Earl of Bedford, upon the first covenant made 4. Eliz. for the confidence that he put in the Feoffees, as to the profits that he himself was to have, was but for the forty years, and how can any other say that he shall have any other Estate, when he himself saith, that he will have it but for forty years, and therefore in this case his right Heir shall take as a Purchaser, by the intent of the Feoffer which hath power to make a disposition of the use at his pleasure, and his pleasure is (as appeareth) was to have it so, and it is not as if the use had been limitted to the said Feoffees for life with such a Remainder over, in which Case the use of the Fee by the operation of Law ought to execute in himself by the Freehold which he had in them before: As where Land is given to one for life, the Remainder to his right Heirs, he hath a Fee-simple executed, but here he shall have but an Estate for forty years precedent, and that the Fee-simple cannot be executed by such a limitation made to the right Heirs, but in case of an Estate for years only precedent such a limitation to his right Heirs afterwards is not good, but in case of an use it is otherwise, for it may remain to be executed, to be an use in Esse where the right Heir shall be, and therefore not to be resembled to an Estate made in Possession. And an use is always to be guided according to that which may be collected to be the purpose and intent of the parties: And therefore if a man make an Estate of his Lands without limitation of any use or confidence, the Law shall say that it is to his own use, but if it be upon confidence then it shall be to the

the uſe of the party to whom it is made, or according to the confidence which ſhall be abſolute, or according to that which is limitted, which may alter that which otherwiſe ſhall be taken upon the generall confidence, as 30 H. 6. Fitz. Deviſe, If a man deviſe Lands to another in Fee, he hath the uſe and Title of it, but if it be limitted to his uſe for his life only, the uſe of the Fee ſhall be to the Heir of the Deviſor, for by the limitation his intent ſhall be taken to be otherwiſe, then it ſhould be taken if this limitation had not been mad in as much as in this caſe the Earl reſerves to himſelf but the uſe for years, it is evident that his intent never was to have the Fee, to ſurrender this Will, which perhaps he intended to be for the benefit of his will, which ſhall be defeated contrary to his purpoſe, if the Fee ſhall be alſo in him by the death of the ſayd Lord, without Iſſue Male, and therefore the ſayd Daughters ought to have the Land. And on the other part it was argued by Glanvil Serjeant, and Egerton the Attorney Generall, that this limitation made to the right Heirs, is void in the ſame manner, as if a man give Lands to another for life, the Remainder to the right Heirs of the Feoffor, in this caſe the Heir ſhall take by deſcent as a Reverſion remaining to the Feoffor, and not as a Remainder veſted out of him, for the ancient right privilenge the Eſtate which he may take, and therefore he ſhall take it by deſcent and not by purchaſe; for the name of right Heir is not a name of purchaſe betwixt the Anceſtor and his heir, becauſe that doth inſtance that he happeneth to be heir, he takes it by deſcent, and then it comes too late to take by purchaſe; And another reaſon that the Daughters ſhall not have it is, becauſe that when Sir John Ruſſell dies without Iſſue Male, which Eſtate might have preſerved the Remainder, if it ſhall be a Remainder, there may not any right heir of the ſayd Francis Earl of Bedford to take this Remainder, becauſe that the ſayd Earl ſurvived him: And therefore it is to be reſembled to this Caſe; Land is given in Tail, the Remainder to the right Heirs of A. G. the Donee dyes without Iſſue in the life of J. G. in this caſe, albeit J. G. dyes afterwards having an heir, yet this heir ſhall never have the Land, becauſe he was not heir in Eſſe to take it when the Remainder fell, and for the mean Eſtate for years this cannot preſerve a Remainder, no more then when Land is given for years, the Remainder to the right Heirs of J. G. this Remainder can never be good if J. G. be then living, becauſe ſuch a Remainder cannot depend but upon a Free-hold precedent at leaſt, and therefore the Inheritance here ſhall go to the now Earl of Bedford by the ſecond aſſurance. And upon conſideration of the Caſe and ſeverall Conſirmances upon this, mynde the Judges and Barons, it muſt needs paſſe (but Warren Clarke) that the Daughters ſhall not have the Mannors in the County of Dorſet, but the now Earl of Bedford, and principally upon this reaſon, becauſe there was no right Heir to take as Purchaſor when the yeares Eſtate Tayle was determined, which was by the Lord Ruſſell without Iſſue Male, for they agreed that the Remainder to the right Heirs of it in a Remainder cannot be preſerved by the mean Eſtate for years, for it ought to be a Free-hold at leaſt which ought to preſerve ſuch a Remainder, untill there be one to take by name of Purchaſor as right Heir: And at this day they did not think there was any diverſity betweene the Caſe of a Remainder in Poſſeſſion limitted to the right heir of one, and of a Remainder in uſe ſo limitted over to another.

Mich. 34. And 35 *Eliz.* In the Kings Bench.

3. IN Ejectione firmæ upon ſpeciall verdict the caſe was thus, A man poſſeſſed of a Leaſe of years in right of his wife, made a Leaſe for years of the ſame Land to begin after his death which made the Leaſe, and afterwards he dyes and his wife ſurvived him, and the queſtion was, whether the wife ſhall have the Land after the death of the husband, or the Leſſee, for if the husband had devi-

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viſed the ſame Land to an eſtranger, yet the Wife ſhall have it and not the Deviſee, as it happened in the Caſe of Matthew Smith, who made firſt ſuch a Deviſe of a Term of his Wife, and yet the Wife had it; becauſe that by the death of the husband (before which the Deviſe did not take effect) the wife had it in her firſt Right not altered in the life of her Husband; but it was agreed in this caſe by all the Court, that the Leſſee ſhall have it during his Term, for as the husband during his life might contract for the Land for the whole term which the wife had in it, ſo might he do for any part of the term at his pleaſure, for if he may deviſe the Land for one and twenty years to begin preſently, he alſo may make it to begin at any time to come after his Death, if the term of the Wife be not expired, but for the Remainder of the term of the husband, made no diſpoſition during his life, the Wife ſhall have it, which by Popham this Caſe happened upon a ſpecialll Verdict in the County of Somerſet, about 20 Eli. Where he and Sergeant Baber were Practiſers in the Circuit there, to wit, the Lands were demiſed to husband and wife for their lives, the Remainder to the Survivor of them for years, the Husband granted over this term of years and dyed, and the queſtion was whether the Wife ſhall have the term of years or the Grantee, and adjudged that the Wife ſhall have it, and it was upon this reaſon, becauſe there was nothing in the one or the other to grant over, untill there was a Survivor: And the ſame Law had been if the Wife had dyed after the Grant, and the Husband had ſurvived, yet he ſhall have the term againſt his own Grant; as if a Leaſe were made for Life, the Remainder for years to him which firſt cometh to Pauls, if A. grant this Term for years to another, and afterwards A. is the firſt which commeth to Pauls, yet the Grantee ſhall not have this Term becauſe it was not in A. by any means neither in Intereſt nor otherwiſe untill he came to Pauls: As if a man make a Leaſe for life, the Remainder to the Right heirs of J.S. J.S. hath Iſſue a Son which ſelleth this Remainder, and afterwards I.S. dyed, this Son being his Heir notwithſtanding his Sale, he ſhall have this Remainder & not his Grantee, becauſe it was not in him at the time of his Grant, but by a matter which cometh. Ex poſt facto, to wit the death of his Father, and afterwards Judgment was given in the firſt caſe, that the Grantee ſhal have the term granted to him by the Husband, and that the Wife ſhall not have the term during this Leaſe

Hunt *Verſus* Gateler.
Mich. 34. and 35 *Eliz.* in Commun. Banco.

IN a Replevin between Hunt Plaintiff, and Gateler Avowant in the Common Pleas, which was adjorned for difficulty into the Exchequer Chamber, the Caſe was thus, Tenant in tail, Remainder in Fee, he in Remainder in Fee grants a Rent-charge in Fee out of the ſame Land, to begin after the Eſtate tail determined, Tenant in Tail ſuffer a common Recovery with a Voucher over, to the uſe of the ſayd Hunt in Fee, and dyed without Iſſue inheritable to the intail, and whether Hunt ſhall now hold the Land charged with the Rent, was the queſtion; and after that it had long depended, and was many times argued in the Common Pleas, and Exchequer Chamber, at Hertford Term it was at laſt reſolved by all the Juſtices and Barons unanimouſly, that the ſayd Rent charge was gone by the Recovery, although the Eſtate tail was expired, becauſe that he which is in, is in under this Intail: And therefore Popham ſayd, ſuppoſe that the Tenant in tail himſelf before the Recovery had granted a Rent charge out of the ſame Land, or had made a Leaſe for years, or had acknowledged a Statute, all theſe had been good, and to be executed againſt him which cometh in under the Recovery, notwithſtanding that the Eſtate tayl had been determined for want of an heir inheritable

Vide this caſe *Cook lib.* 1. 61. by the name of *Capels* caſe.

to the intail, for he which recovereth cannot ſay that he againſt whom he recovered had but an Eſtate in tail, and if his Leaſe remain yet good (as all agreed it did) how can the Leaſe, a Rent granted by him in the Remainder, be good alſo, for the one and the other cannot ſtand together, and therefore all the Leaſes, Charges, or Statutes acknowledged or made by him in the Remainder, are gon and avoided by the Recovery had againſt Tenant in tail. To which opinion all the other agreed, and Popham ſayd further, That he in the Remainder upon an Eſtate tail, cannot by any means plead to defend his Remainder, unleſs the Tenant will as by vouching of him, and therefore ſhall be bound by the Act of Tenant in Tail, where the Eſtate it ſelf is bound as here it is by the Voucher, and then they which come in by him in the Remainder by way of Leaſe, Charge, or Statute, (which are not ſo much favoured in Law as Tenant in tail himſelf) be in better condition then he in the Remainder himſelf is; for he in the Remainder upon an Eſtate tail cannot put more into the Mouth of the Leſſee or Grantee to defend their Eſtates, then he himſelf could have to defend his Remainder, and this is the reaſon that ſuch a Termer or Grantee ſhall never falſifie the Recovery had againſt Tenant in tail, as the Grantee or Termer ſhall do which cometh in under Tenant in tail againſt whom the Recovery was had, for there as the Tenant in tail may plead to defend his Poſſeſſion and Eſtate, ſo may his Termer or Grantee of a Rentcharge do, for by the Demiſe or Grant made, the Tenant in tail hath put all the Pleas into their mouthes for their Intereſts which he himſelf had to defend his Right and Poſſeſſion, which they may plead for the time to defend their Poſſeſſions and Rights as well as the Tenant in tail himſelf may do, and this is the reaſon that ſuch may falſifie Recoveries againſt their Leſſors or Grantors, if they be not had upon the meer right Paramount, which he that cometh in by ſuch a Remainder as before cannot do, for ſuch a one in Remainder cannot be received to defend his Right, but his mouth is meerly forecloſed to do it, and by the ſame reaſon are all thoſe which come in by ſuch men forecloſed to defend their Intereſts or Eſtates, and upon this Judgement was given in the ſame Tearm in the common Pleas.

Gibbons *verſus* Maltyard *and* Martin.

Vide *this caſe in* Cook lib. 8. 130 Thetford *Scholies caſe.*

IN an Ejectione firmæ, brought in the Kings Bench by John Gibbons Plaintiff, upon a Demiſe made by Edward Peacock the Son, of Lands in Croxton, in the County of Norfolk, againſt Thomas Maltyard and John Martin, upon a ſpeciall verdict, the caſe appeared to be thus, to wit, that Sir Richard Fulmerſton Knight, was ſeiſed of the ſayd Lands (amongſt others) holden in ſoccage in his Demeſne as of Fee, and being ſo ſeiſed by his laſt Will in Writing, made 9 Eliz. Ordained that a Deviſe ſhall be made by his Executors that a Preacher ſhall be found for ever to preach the Word of God in the Church of Saint Maries in Thetford, four times in the year, and to have for his Labour ten ſhillings for every Sermon. And further he deviſed to his Executors and their heirs certaine Lands and Tenements in Thetford aforeſaid to this intent; and upon this condition, that they or the Survivor of them within ſeven years after his deceaſe, ſhould procure of the Queens Highneſs to erect a free Grammar School in Thetford for ever to be had and kept in a houſe by them to be erected upon part of the ſayd Land, & that they ſhal aſſure three of the ſaid tenements for the houſe and Chamber of the Schoolmaſter and Uſher, and their Succeſſors for ever, and for the other tenement, that they ſhall make an aſſurance of it for the Habitation of four poor people (two men and two women) for ever. And for the better maintenance of the ſayd Preacher, Schoolmaſter, Uſher, and Poore people, be

he deviſed (amongſt others) his ſayd tenements in Croxton to his Executors for ten years for the performance of his Will, and after this he deviſed them to Sir Edward Cleer, and Frances his Wife (the Daughter and Heir of the ſayd Sir Richard, and to the Heirs of the ſayd Sir Edward, upon Condition, that if the ſayd Sir Edward his Heires or Aſſignes, before the end of the ſayd ten years ſhall aſſure Lands or Tenements in poſſeſſion to the value of five and thirty pounds a year, to the ſayd Executors or the Survivor of them, their Heirs and Aſſignes, or to ſuch perſons their heirs or Succeſſors as his ſayd Executors or the Survivor of them ſhall name or aſſigne for and towards the maintenance of the ſayd Preacher, Schoolmaſter, and Uſher, in the ſayd School houſe, &c. and for the releif of the ſayd poor people in the one of the ſayd houſes, according to the Ordinance as he himſelf in the ſayd Will had declared, or otherwiſe as by his Executors or the Survivor of them ſhall be preſcribed. And if the ſayd Sir Edward and his Heirs ſhall make default in the aſſurance of the ſayd Land by him to be aſſured as aforeſayd, then hee will that immediatly upon ſuch default, his Eſtate, and the Eſtate of the ſayd Frances ſhall ceaſe in the ſayd Lands in Croxton, &c. and then he deviſe the ſame Lands to his Executors and their Heirs for ever to the uſe of them and their heirs upon truſt and confidence that they or the Survivor of them and their Heirs ſhall aſſure the ſame, or otherwiſe yearly diſpoſe the profits of them in finding the ſayd Preacher and other charitable workes as aforeſayd, and made Edward Peacock Father to the Leſſor, (whoſe Heir the Leſſor is) and others his Executors, and dyed 9. of the Queen, after whoſe Death all the Executors refuſe to be Executors. The ſeven years paſſe without the eſtabliſhing of the School, and other things according to the Will for the firſt part of it, whereby the Land in Thetford was forfeited to the heir for the Condition broken, and within the ten years Sir Edward Cleer made a Feoffment of Land to the value of 35 l. a year to the ſurviving Executor, for the uſe of the School, but with a condition contrary to the Will, and no Livery was made upon the ſayd Feoffment, but it was inrolled of Record in the Chancery, whereby the ſayd Sir Edward had broken the Condition annexed to his Eſtate, and alſo during all this time neither the Executors nor their Heirs had done any thing in finding the Preacher or the other workes of charity with the profits of the ſayd Lands in Croxton, or in aſſuring of it according to the Will, and yet the ſayd Edward Peacock the Son in September 32. Eliz. being Heir to the ſurviving Executor, entred into the Land in Croxton, and demiſed it to the Plaintiff for ſeven years, upon which the Defendant as Servant, and by the commandement of Sir Edward Cleer, and of Edmund the Son and Heir of the ſayd Frances (who was then dead) entred, upon which entry and Eſtatment the Action was brought, and it was moved by Godfrey and others that the entry of the Defendants was lawfull, firſt in the right of the ſayd Sir Edward, becauſe that his Eſtate by the Statute of 23. H. 8. cap. was without condition, or determined; becauſe that by this Statute all the uſes limited in ſuch a manner are made void, becauſe they are in the nature of a Mortmain, as may appear by a Proviſo at the end of the ſame Statute for a certain perſon of Norwich who had Deviſed Lands for the eaſe of the poor Inhabitants of the ſame Citty, in Taxes and Tallages, and for cleanſing of ſtreets there and for diſcharge of toll, and Cuſtome within the City, all which were good uſes, and not tending to Superſtition, and yet if it had not been for the Proviſo they had been gon by the body of the Statute: And the Statute ordained alſo, that every penalty and thing which ſhall be deviſed to defraud this Statute ſhall be void; and if this do not help them, yet the Entry made in the right of the ſayd Heir, of Sir Richard Fulmerſton, is good; for the eſtates of the ſayd Executors are alſo bound as with a tacite condition that theſe things ſhall be performed which are not done, and therefore the entry in right of the

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heir is lawfull, for the words Ad propoſitum, ea intentione, and the like in a Will are good Conditions which Gaudey agreed, & vouched the caſe 28. Seſſ. Pl. but it was after often argument agreed by all the Court that the firſt exception was to no purpoſe, for they conceived that this Statute was to be taken to extend only to the uſes which tend to Superſtition, as might be collected as well by the words of it in the very body of the Act at the beginning, as by the time in which it was made, for at this time they began to have reſpect to the ruine of the authority of the Pope, and to the diſſolution of the Abbies, Chantries, and the like: And by Popham, the Proviſo was put in the Statute, but for ſatisfaction of the Burgeſſes of the ſame City at this time, and not for any neceſſity as oftentimes it happens. And for the other point, he ſayd, that it appeareth fully by the Will that it was not the intent of the ſayd Sir Richard to have the Land in Croxton bound with any condition in the poſſeſſion of his Executors, or with any other matter which determine their Eſtate, for the Words, that they ſhall have it upon truſt and confidence, exclude all conſtraint which is in every condition, and the Will is, that they ſhall have it to the uſe of themſelves and their Heirs for ever, which cannot be if it ſhall be abridged by any Limitation or Determination: And he ſayd, that the Lord Anderſon demanded of him a Caſe which was adjudged in the Common Pleas 29. Eliz. Rot. 639. which was thus, One Michel made a Leaſe for years rendring Rent, and for default of payment a re-entry with Covenants on the part of the Leſſee to repair the Meſſuages, &c. and the term continuing the ſayd Michel, by his Will in Writing, deviſed the ſame Land to the ſayd Leſſee for more years then hee had to come in it, rendring yearly the like Rent, and under the ſame Covenants which he now holds it, and dyed, and afterwards the firſt term expired, the Leſſee does not repaire the Houſes, and the queſtion was, whether by this he hath forfeited his term, and adjudged that as to this it was not any condition, and a Covenant it could not be, for a Covenant ought alwaies to come on the part of the Leſſee himſelf, which cannot be in this caſe, for he doth not ſpeak any thing in the Will to bind him, but they are all the words of the Deviſor himſelf which compriſed in a Will, and it never was his intent to have it to be a condition, and therefore void as to the Leſſee to bind him either by way of Covenant or Condition, ſo here, &c. And for the ſayd Feoffment enrolled without Livery, it was agreed by all, that it was not of any force to make the Land to paſſe to the Executors, but the enrolment conclude him to ſay not his Deed; And alſo that the Executors refuſe to be Executors, this ſhall not hinder them to take by Deviſe as to the Inheritance, whereupon it was adjudged that the Plaintiff ſhall recover as appears.

Thomſon *Verſus* Trafford.
Hillary Term 35 of Queen *Elizabeth*.

IN an Ejectione firmæ, between John Thomſon Plaintiff, and Thomas Trafford Defendant, the caſe was thus, The Preſident and Schollers of Magdelen Colledge in Oxford, 20 Decemb. 8. Eliz did let a Meſſuage in the Burrough of Southwark, to which no Land appertained to William Standiſh for twenty years, from the Feaſt of Saint Michael next enſuing, rendring the ancient Rent, and 25. Octob. 21. Eliz: they did let the ſame Meſſuage to the ſame Standiſh for twenty years from the Feaſt of Saint Michael then next enſuing, rendring alſo the ancient Rent, and 31 Auguſt 30. Eliz. The Preſident and Schollers made a new Leaſe of the ſame Meſſuage to Sir George Carew Knight, for twenty years from making of the Leaſe rendring the ancient Rent, which Leaſe was conveyed by mean Aſſignments to the Plaintiff, upon which the Action was brought againſt the ſayd Trafford

which

which had the Intereſt of the ſayd Standiſh by mean Aſſignments: Popham ſaid, that Ipſo facto upon the laſt Leaſe made, and annexed by Standiſh, the firſt Leaſe was determined and gone, for this laſt contract diſſolves the firſt when the one and the other cannot ſtand together, as they cannot here, becauſe the one intermix with the other, and ſo was the opinion in the Common Bench about 1 Eliz. in the caſe of the Abby of Barking, of which I have ſeen a Report.

And here Standiſh before Michaelmas, next after the ſecond Leaſe made to him could not grant over his firſt term to be good to the Grantee, for if this ſhould be, the ſecond term ſhall not be good to Standiſh, but for the remnant of the years after, the firſt term finiſhed, which cannot be becauſe it ſtandeth in the power of the Grantor with the aſſent and acceptance of the Grantee to make the ſecond Grant good, for the whole term, to wit, from Michaelmas, and this cannot be but by a determination in Law of the firſt term immediatly, which is made by his own acceptance, and therefore a prejudice to none but himſelf, and Volenti non fit injuria, and the firſt Term cannot have his continuance untill Mich. but is gone preſently by the acceptance of the ſecond Leaſe in the whole, for the firſt contract which was entyre cannot be ſo diſſolved in part, but in the whole, as to that which the party hath, and therefore the firſt Term (as the caſe is here) is gone in the whole, to which Clench and Gaudy agreed: And if ſo then this laſt Leaſe to Standiſh was but as a Leaſe made to begin at a time to come, which is made good by the Stat. of 14 Eliz. if it do not exceed the time of 40 years from the making of the Leaſe; for the purpoſe of this Act was, that Colledges and the like ſhall not make Grants in Reverſion, albeit it be for a year, and the reaſon was, becauſe that by ſuch Grants in Reverſion they ſhall be excluded to have their Rent of the particular Tenants for the time: And therefore in the caſe of the Counteſſe of Suſſex, who had a Joynture aſſured to her for her life by Act of Parliament, with a Proviſo, that the Earle her Husband might demiſe it for one and twenty yeares, rendring the uſuall Rent, where the ſayd Earle had made a Leaſe for one and twentie yeares, according to the Statute, within a yeare before the end of the ſame Leaſe, the ſaid Earle made a new Leaſe of the ſame Land to Wroth his Servant for one and twentie yeares, to begin after the end of the former Leaſe, rendring the uſuall Rent, and died, the ſaid Counteſſe avoided this laſt Leaſe by Judgement given in this Court, becauſe it ſhall be intended to be a Leaſe in Poſſeſſion, which he ought to make by the Proviſo, from the time of the making of it, otherwiſe by ſuch perverſe conſtruction, the true intent of the Statute ſhall be utterly defrauded. But here to make a Leaſe for twentie yeares to one in Poſſeſſion, and to make another Leaſe to another for twentie yeares, to begin after the end of the former Leaſe, is good, becauſe that the one and the other do not exceed the fortie yeares compoſed in the Statute.

And the Juſtices of the Common Bench the ſame day at Sergeants Inn agreed to the opinion of Popham for the determination of the whole firſt Term, by the taking of the ſecond Term by Standiſh.

Ward *versus* Downing.

2. IN an Ejectione firmæ brought by Miles Ward against Robert Downing, the case was thus; One Robert Brown was seised of certain Lands in in the County of Norfolk, in his Demesne as of Fee (which were of the nature of Gavelkind) and had Issue George his eldest Son, William his middlemost Son, and Thomas his youngest Son, and being so seised 6 Decem. 1559. made his Testament in writing, by which he devised the said Tenements in these words.

Item, I give unto Alice my wife the use and occupation of all my Houses and Lands, as well free, as copy-hold, during her naturall life.

Item, I will, that George my Son shall have after the decease of his Mother all those my Houses and Lands, wherof the use was given to his said Mother for the term of her life, To have and to hold to him and his Heirs for ever, and if the said George dye without Issue of his body lawfully begotten, then I will my said Lands shall in like manner remain unto William my Son and his Heirs for ever. And I will that all such money as shall be payd of any Legacy by the said George, shall be allowed by the said William, to whom the said George shall appoint.

Item, I will, that if the said George and William depart the world before they have Issue of their bodies lawfully: Then I will that all my said Houses and Lands shall remain unto Thomas my Son and to his Heirs for ever.

Item, That if the said George shall enjoy my said Houses and Lands, then I will the said George shall pay out of the said Lands to William and Thomas his Brother 26 l. 13 s. 4 d. that is to say, at his first entry into the said Lands, to pay unto the said William his Brother 40 s. and so to pay yearly untill the summ of 13 l. 6 s. 8 d. be fully answered and payd, and then immediatly to pay unto Thomas his Brother 13 l. 6 s. 8 d. to be payd unto the said Thomas, when the said William shall be fully answered by 40 s. a year, in like proportion as is aforesaid: And if my said Son George shall refuse to pay unto William and Thomas his Brother the summe of 26 l. 13 s. 4 d. in manner and form as is before limitted; Then I will that all my Houses Lands and Tenements with the Appurtenances remain to William my Son and his Heirs for ever, paying therfore 26 l. 13 s. 4 d. viz. 13 l. 6 s. 8 d. to George my Son, and 13 l. 6 s. 8 d. to Thomas my Son, in such manner and sort as the said George shall pay if he should enjoy the said Lands: And if it fortune the said William to enjoy the said Lands, then the said William shall pay unto Thomas his Brother the whole summ of 26 l. 13 s. 4 d. as is aforesaid. After which the said Robert dyed seised of the said Tenements in question, and his said wife entred into them for her life by virtue of the said Will, in whose life time the said George dyed without Issue, after which the said Thomas also, to wit, 9 Dec. 1576. made his Testament in writing, and of this made Mary his wife his Executrix, and dyed, having Issue Martha by the said Mary; Afterwards the said Alice the wife of the Devisor, the last of March, 22 Eliz. dyed, and after her death, to wit, the first of May 32 Eliz. the said William entred into the said Tenements, and was therof seised in his Demesne as of Fee-tail, and the said Mary in the life-time of the said Alice proved the Testament of the said Thomas Brown, and the said William did not pay the said 26 l. 13 s. 4 d. to the said Mary, nor any part therof according to the Will, and the said Martha being Daughter and Heir of the said Thomas therupon entred into the said Tenements, and did let the said Poverty of which the said Action was brought to the said Ward for two years, upon which the said Downing in the right and by the commandment of the said William re-entred, and expelled the said Plaintiff but the

conclusion

concluſion of the Verdict was not upon the expulſion, but only if the entry of the ſayd Downing ſhall be adjudged lawfull, then they find the Defendant not guilty, and if it were not lawfull, then they find him guilty.

Fennor, the Eſtate of the ſayd William is conditional by the Will, to wit, that he ſhall pay to Thomas the 40 Marks, according to the Will, becauſe the Will is, that the ſayd money ſhall be payd as is aforeſaid, or before the ſayd moneys which were to be payd, was expreſly limitted to be payd upon the forfeiture of his Eſtate: And further if it ſhall not be taken for a Condition, then Thomas hath no remedy for the money to be payd to him; and although it be limitted to be payd but to Thomas, who was dead before the day of payment of it, yet it ſhall be taken as a duty limited to him which ſhall be paid to his Executors, becauſe that a time certain is limited for the payment of it, to wit, when the Land is come to the ſayd William, which is, by the death of the ſayd Alice, but if no time had been limitted for the payment of it, and they had died before the payment of it, it had been otherwiſe; And it being a condition in William, albeit it deſcend upon him, as well upon him as upon the Heir of the ſayd Thomas, yet it remains a good Condition for the part of the Heir of the ſayd Thomas, not determined by the deſcent of the other part upon the Heir of the ſayd William.

And further he ſayd, that here the Condition ſhall not be ſayd to be broken, but upon refuſall of payment by the ſayd William, as in the caſe of George to whom it refers by the words (as is aforeſaid) which refuſall is not found, and therefore the Plaintiff ſhall be barred.

Clench. The Executors of the ſaid Thomas know not when, nor at what place to demand it, and therfore he thinks that the ſaid William ought to have tendred the money to the ſaid Executrix at his perill.

Popham, The payment limited to be made by the ſaid George is at his firſt entry after the death of Alice, and then to pay 40 s. and ſo yearly untill 40 Marks are paid to the ſayd William, and thereupon 40 s. yearly to the ſayd Thomas, untill other twenty Marks are paid to him; ſo that this is the form of the payment, to wit, at his entry, as well for the place as the time, for it cannot be made at his entry, unleſs upon the Land it ſelf, and therfore by the purport of the Will, the Land ſhall be taken for the place where the payment ought to be made, for avoiding the inconvenience which otherwiſe will enſue; As if I am bound to pay to you 20 l. upon your firſt coming to ſuch a place, this place ſhall be taken for the place where the payment ſhall be made. And whereas it is ſaid further in the Will, and ſo to pay yearly 40 s. untill the twenty Marks are paid to William, this payment alſo by the words (and ſo to pay yearly, &c.) ſhall be at the ſame place at the end of every year, upon the next day after the end of it, or otherwiſe there will be no certainty when it ſhall be paid, and therfore the firſt day of every year ſhall be the very day of payment, and this alſo by virtue of the ſaid words (and ſo yearly) And at the laſt day of payment by George to William, or Thomas there ought to be paid but 26 s. 8 d. becauſe that then there remains no more to be paid of the ſumms limited to be paid to them; And when the Will here hath finiſhed with George for that which he is to pay, it goes further, and if he refuſeth to pay the ſaid ſumms to William and Thomas, in manner and form aforeſaid, then he wils that all the ſaid Lands ſhall remain to the ſaid William and his Heirs for ever, paying yearly, &c. and ſo there is an expreſs penalty to George if he refuſe to make payment, to wit, that he ſhall looſe the Land for default of payment made by George by the word (paying) annexed to the Eſtate which is a Condition, but he conceived that this laſt payment to be made to Thomas, is not to be made upon any penalty, nor that a Condition is to be implyed in it, although Thomas hath no remedy for it, but in conſcience, becauſe it is a meer confidence put in William to pay it: And he ſaid, that he was the rather moved to be of this opinion, becauſe every one of the

precedent

precedent Limitations was with an expreſſe Condition annexed to them, as to George, if he refuſe, &c. But when William is to have but an Eſtate-tail upon the determination of the Eſtate made to George, for default of Iſſue there he ſaith nothing, but that the ſaid William ſhall pay to the ſaid Thomas fortie Marks, as is aforeſaid, which is but a declaration of his intent, that he put confidence in him for the payment of it, and did not bind himſelf upon condition, as in the other caſes, which he might have done by expreſſe words of condition, if his intent had been ſo, as well as he did in the other caſes, if his purpoſe had been ſo; and the words, that he ſhall pay, as is aforeſaid, is to be underſtood for the place and time when it ſhall be paid, according as George ought to pay it: And it doth not ſeem to ſtand with reaſon, to expound it, for a Condition to deſtroy the Remainder limited to the ſaid Thomas; but if it ſhall be a Condition upon a relation, becauſe of the words, that he ſhall pay it, as aforeſaid mentioned, that the payment ought to be paid to the Executor of the ſaid Thomas, albeit he died before the day of payment, becauſe this was a ſumm in groſſe limited to be paid to the ſaid Thomas at a certain time. But if it ſhall be taken for a Condition in William, he thinks clearly that the ſaid William ought to have given notice to the Executrix of the ſaid Thomas before he had made his firſt entry into the Land of the Ten. when he intended to make his entry, ſo that the Executrix might be there at the ſame time to have made demand of the money, which ought to have been done, or otherwiſe there cannot be a refuſall in the ſaid William, and without his refuſall or other default in him, the Condition cannot be broken, if it had ſuch a relation as to make the payment as George ought to do it: And ſo the Executor of Thomas cannot have notice when William will make his firſt entry into the Land, if he do not give him notice of it, and therefore if it ſhall be a Condition it had been broken on the part of William, for want of giving notice to the Executor of the time of his firſt entry, whereby the Executors might have notice of the time to make his demand, becauſe without a demand refuſall cannot be, and the Executor is excuſed to make demand when he had no notice of the time, and therefore the default of William in not giving notice of it ſhall be taken againſt him as ſtrongly as if he had made a refuſall to pay upon demand; for if notice had been given to the Executor, and he had demanded the money, and William had ſaid nothing to it, but omitted to pay it, yet this ſhall be a refuſall in Law.

But of this nothing appeareth in the Verdict, whether the Executor had notice given to him or not, nor nothing mentioned in the Verdict whether any demand or refuſall was made of the money or not, and therefore the Verdict as to theſe points is incertain to judge upon, whether it ſhall be taken to be a Condition in William: But it ſeems as the Verdict is, that Judgment ought to be given againſt the Plaintiff, for the concluſion of the Verdict is upon the entry of the Defendant, whether this be lawfull or not, and not upon the expulſion, or whether upon the other Moyetie his entry was lawfull in right of the ſaid William, becauſe they were Tenants in Common.

3. IN Treſpaſſe of Aſſault, Battery, and Impriſonment, made ſuch a day at in the Countie of Cornwall, brought by againſt : The Defendant ſaith, that he was Conſtable of the ſame Town, and that the Plaintiff the ſaid day, year, and place, brought an Infant not above the age of ten daies in his armes, and left him upon the ground to the great diſturbance of the people there being, and that he commanded the Plaintiff to take up the ſaid Infant, and to carry it from them with him, which the Plaintiff refuſed to do, for which cauſe he quietly laid his hands upon the Plaintiff and committed him to the Stocks in the ſame Town, where he continued for ſuch a time, untill he agreed to take up the Infant again, which is the ſame Aſſault, Battery, and Impriſonment, of which

which the Plaintiff complains, upon which the Plaintiff demurred. Fennor was of opinion that that, which the Conſtable did was lawfull, and that it is hard that an Officer ſhall be ſo drawn in queſtion for it, for this ſhall be an utter diſcouragement to good Officers to execute their Offices as they ought to do. Popham, A Conſtable is one of the moſt ancient Officers in the Realm for the conſervation of the Peace, and by his Office he is a Conſervator of the Peace; and if he ſees any breaking of the Peace, he may take and impriſon him untill he find ſurety by obligation to keep the Peace: And if a man in fury be purpoſed to kill, maime, or beat another; the Conſtable ſeeing it, may arreſt and impriſon him untill his rage be paſſed, for the conſervation of the Peace. And if a man layes an Infant which cannot help it ſelf upon a Dunghill, or openly in the field, ſo that the Beaſts or Fouls may deſtroy it, the Conſtable ſeeing it may commit the party ſo doing, to Priſon, for what greater breach of the Peace can there be then to put ſuch an Infant by ſuch means in danger of its life? And what diverſity is there between this caſe and the caſe in queſtion, for no body was bound by the Law to take up the Infant but he which brought it thither, and by ſuch means the Infant might periſh, the default therof was in the Plaintiff, and therfore the Action will not lye: And therupon it was agreed that the Plaintiff take nothing by his Writ.

Hayes *verſus* Allen.

4. TErm. Paſch. 33 Eliz. Rot. 1308. A Cui in vita was brought in the Common Pleas, by Ralph Hayes againſt William Allen, of a Meſſuage with the Appurtenances in St. Dunſtans in the Eaſt, London, in which it was ſuppoſed that the ſaid Wil. had no entry, but after the demiſe which John Bradley, late husband to Anne Bradley, Aunt of the ſaid Ralph (whoſe heir the ſaid Ral: was) made to Tho. Allen and Jo. Allen, and counts accordingly, & ſhews how Coſin and Heir, to wit, Son of Wil. brother of the ſaid Anne, Wil. Allen traverſe the Demiſe made to the ſaid Tho. and Jo. Allen, and at Niſi prius it was found, that the ſaid Jo. Bradley and Anne his wife was ſeiſed in their demeſn as of fee, in right of the ſaid Ann, of a Meſſuage in S. Dunſtans aforeſaid, containing from the North to the South 18 foot, and from Eaſt to Weſt 12 foot and a half, and being ſo ſeiſed during their Marriage, by their Deed, ſealed with their Seals, enfeoffed the ſaid Tho. Allen and Jo. Allen therof, to hold to them and their heirs, to the uſe of the ſaid Jo. Bradley and Anne his wife for their lives, and afterwards to the uſe of the Church-wardens of S. Dunſtans, Lond. and of their ſucceſſors for ever, to the uſe of the poor of the ſame place, and that Livery was made accordingly, and that the ſaid Deed was inrolled in the Chancery at Weſtm. and that afterwards the ſaid Anne died, and that Jo. Bradley ſurvived her & died, and that the right of the ſaid Meſſ. deſcended to the ſaid Ra. as coſin and heir of the ſaid A. And that Sir W. Allen K. was ſeiſed of a peece of land in S. Dunſt. aforeſaid, containing 6 foot 4 inches contigious and adjacent to the ſaid Meſſ. late the ſaid Jo. Bradleys and A. his wife, in his demeſn as of fee; And that the ſaid Sir Wil. after the ſaid feoffment, and before this Writ purchaſed, utterly drew away the ſaid Meſſuage, late the ſaid John Bradleys and Ann his wife, and erected a new houſe upon the Land of the ſaid Sir William, and upon part of the Land upon which the other houſe ſtood, containing from the North to the South thirteen foot, & from the Eaſt to the Weſt eighteen foot ten inches, which Meſſuage ſo newly built, ſtood the day of the Writ purchaſed, and yet ſtands. &c. And if upon the whole matter the ſaid Demiſe of the ſaid John Bradley and Anne be, and in Law ought to be adjudged the Demiſe of the ſaid Meſſuage, newly built upon the ſaid part of land, where the Meſſuage of the ſaid John Bradley and Anne ſtood, then, the Jury find that the ſaid John Bradley demiſed to the ſaid Thomas and Iohn Allen the ſaid houſe newly erected as aforeſaid, as the Plaintiff hath alledged, and if not, then they find that he did not demiſe.

And upon this Verdict Judgment was given there, and an eſpeciall Writ of Habere facias ſeiſinam awarded of the ſaid Meſſuage, with the Appurtenances; viz. 18 foot of it from the North to the South, and 12 foot and an half of it from the Eaſt to the Weſt; upon which a Writ of Error being brought in the Kings Bench, it was alledged for Error by Coke Solliciter that upon this Verdict Judgment ought to have been given for the Tenant, and not for the Demandant, for what was remaining of that which was of the houſe, is not a houſe, but only a peece of a houſe, and therefore it ought to have been demanded by the name of a peece of Land, containing ſo much one way, and ſo much another; for a houſe walked and utterly drawn away, cannot be demanded by a Meſſuage, but by the name of a Curtilage, or ſo much Land of ſuch contents; for a Præcipe lies of a peece of Land containing ſo many feet in length, and ſo many in breadth: And alſo Land built during the poſſeſſion of him which hath it by Tort, cannot be demanded by the name of Land by him which hath right, but by the name of a houſe, nor e contra, for every demand of Land ought to be made according to the nature of which it is at the time of the Action brought, be it a Meſſuage, Land, Meadow, Paſture, Wood, &c. And if the Walls of a houſe be made upon the Land without any covering, yet it ſhall be demanded but by the name of Land; for he ſaid, that it cannot be a houſe without its perfection to be habitable, which he ſaid is not here, becauſe it ſtands upon the Land of the ſaid Anne, which hath not the perfection of a houſe habitable without the remnant. But this notwithſtanding the firſt Judgment, was affirmed; for it was ſaid by Popham, and other Juſtices, that, that which is erected upon the Land of the ſaid Anne, ſhal be ſaid a houſe as to the right of the Heir of the ſaid Anne, for a houſe may be ſuch to be demanded by the name of a houſe, albeit it hath not all the perfection of a houſe, as if it hath no dores, ſo if it hath part of the five walls not made, drawn away, or fallen, yet the remainder continues to be demanded by the name of an houſe; ſo if part of the covering be decayed, yet it ſhall be demanded by the name of an houſe, and the rather here, becauſe with that which is upon the other Land it is a perfect houſe; And I may have a perfect houſe although the five Walls belong to another: as in London, where a man joynes his houſe to the five walls of his Neighbours, he hath a perfect houſe, and yet the five walls belong to another, and this commonly happens in London, but it is otherwiſe if it were never covered, or if the covering be utterly fallen, or drawn away, for without a covering a houſe cannot be ſaid to be a houſe, for the covering to keep a man from the Storms and Tempeſts over head, is the principall thing belonging to a houſe.

And further, ſuppoſe that a man hath a Kitchin, or a Hall upon Land, to which another hath right, he which hath right ought to demand it by the name of a houſe: ſuppoſe then that there is adjoyning to this upon other land a Parlor, a Buttery, a Shop, a Cloſet, and the like, with Chambers over them, this doth not change the form of the Writ that he is to have which hath right, although before it was built by the name of a houſe, and yet as to the rent both the one and the other was but a houſe, but as to the demandant it is otherwiſe, for they are ſeverall, ſo here: And the Demiſe which before was made of the houſe drawn away, ſhall be now upon the matter a Demiſe, as to this part of it a new Meſſuage; for if a man make a Leaſe for years of a houſe, and the Termor pull it down, and erect there a new houſe, or if land be demiſed, and the Leſſee build a houſe upon it, in an Action of Waſt, for Waſt done in this new houſe, the Writ ſhall ſuppoſe that he did waſt in the Houſes, &c. which were demiſed to him, and yet in the one caſe it is not the Meſſuage which was demiſed to him, and in the other the houſe was not demiſed, but the Land only; But he hath no term in the houſe but by the Demiſe before made: And it ſeems to Popham, that Allen the Defendant cannot pull down this part of the houſe erect upon his own land to the prejudice

of

of the houſe which Hayes demands, if this which is erected upon the land of Allen be of ſuch a neceſſity, that without it the houſe of Hayes cannot ſtand for a houſe; but if he dies after that Hayes hath built it, then Hayes ſhall have an Action upon the caſe againſt him for the damages which he ſuſtained by it: As if a man agree with me that I ſhall ſet the outer wall of my houſe upon his land, and I do it accordingly, and afterwards the party which grants me this licence, breaketh it down, if the Grant were by Deed I ſhall have an Action of Covenant for it, and if but by Parol, yet I ſhall have an Action upon the caſe againſt him. And here this being done by him which was then Owner and Poſſeſſor of the one and the other land, it ſhall be taken as a licence in Law, to the benefit of him which hath right, which he cannot pull down after it is once made, but he ſhall be ſubject to Hayes his Action for it, or otherwiſe Hayes ſhall be at great miſchief and prejudice by the Act of him which did the wrong, which the Law will not ſuffer, but rather ſhall turn this to the prejudice of him which did the wrong, then to the prejudice of the other which ſhall have wrong by the doing of it; for Volenti non fit injuria. As if I am to incloſe between my Neighbour and my ſelf, and my Neighbour pull down this incloſure or part of it, whereby my Cattell eſcape into the land adjoyning, and depaſture there, I ſhall be excuſed of this Treſpaſſe in the ſame manner as if he had licenced me to have occupied it, and whatſoever hapneth to this Land adjoyning by my Neighbours means, ſhall be in the ſame degree as my Neighbours Act, for what he does ſhall be to his own prejudice.

And upon the Judgment affirmed, the Attorney of the ſaid Hayes made the like Writ of Habere facias ſeiſinam, directed to the Sheriffs of London, as was done in the Common Pleas, whereupon it was affirmed to the Court in Hillary Term next enſuing, that the Sheriffs had made their execution by the quantity of the feet compriſed in the writ, and that in the doing of it there was pulled down the part of another houſe of the ſaid Allen which was erected two feet upon the land of the ſaid Anne, and prayed remedy for it, and that this Habere facias ſeiſinam varying from the thing recovered, might not be filed; To which it was ſaid, that this quantity of feet was but a Surpluſage in the Writ, and that the Writ before this was ſufficient and warranted by the Verdict and judgment.

Sherrey *verſus* Richardſon.

5. IN Debt upon an Obligation of 50 l. by Lawrence Sherrey againſt Arnold Richardſon, the caſe was this; 16 Martii 33 Eliz. the ſaid Richardſon was bound to Sherrey in 50 l. with condition to ſtand to and obſerve the Arbitrement, Award, order, rule, finall end and judgment of one Walter Bolton and Edward Price Arbitrators, indifferently elected to arbitrate, award, and judge of and for all Actions, Suits, Quarrels, and Demands whatſoever betwixt them, untill the date of the Obligation, ſo that it be made and done in writing under their hands and Seals, ready to be delivered to the parties, at, or before the laſt day of this inſtant month of April, and the ſaid Arbitrators the laſt day of April, 33 Eliz. made an Arbitrement in writing under their hands and Seals, that within four dales next enſuing the award, either of the ſaid parties ſhall releaſe each to other all Actions, Suits, and Demands before the date of the ſaid Obligation, with this Proviſo, that if either of the ſaid parties ſhall be diſcontented with the ſaid Award, or any part of it, within twenty dales after the Award, that then upon the payment of 10 s. by the party which thinks himſelf agrieved with the Award, to the other, within the twenty dales the Award ſhall be void, & either of them to be at liberty againſt the other as before the Award; and by the whole Court, if the Award ſhall be ſaid made within the time compriſed in

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the Obligation, where the Proviſo had been to be perfoꝛmed after the four daies, it had been good, and a finall Award, becauſe that the Proviſo to make the Award void after the time limited foꝛ making of Releaſes, is repugnant to that which was to be executed befoꝛe, to wit, that either of them ſhall releaſe each to other within four daies, foꝛ every Award ought to be reaſonable and indifferent betwixt the parties in all appearance, and ſo that the one part of it ought not to impugn oꝛ encounter the other, and here to what purpoſe ſhall it be to make the Award void, and to put out at liberty againſt the other, when they have made Releaſes each to other, and what indifferency oꝛ reaſon ſhould there be, that when one hath releaſed, the other may diſſolve the Arbitrement by the Proviſo, and how may the Obligation which had been once foꝛfeited by the not making of the Releaſe within the four daies be helped and become not foꝛfeited by diſſolving of the Arbitrement by the Proviſo. But by Popham, Gawdy, and Clench. if the Releaſes had been limited to have been made at a day to come, as ten daies after, and that the Proviſo had been to have been perfoꝛmed in the mean time befoꝛe theſe ten daies, then the Award had been void, becauſe they had not purſued the ſubmiſſion, foꝛ it was no finall end of the controverſie, in as much as it is not certain by reaſon of the Condition, whether it ſhall be an end oꝛ not: But it ſeems to Popham, that the Award here is not made within the time that it ought to have been made by the Condition, foꝛ the Obligation is alledged to be made the 16 of March, 33 Eliz. and then no month can be the inſtant month but March, and therfoꝛe this word April is but a meer negation, and if it ſhould not be ſo, to what April ſhall it refer? foꝛ there is no matter to guide it moꝛe to one April then another, but the generall intendment which happily ſhall guide it to the next April, foꝛ avoiding of incertainty, if it had not been foꝛ the words (this inſtant moneth) and the words (within this moneth) ſhall not be ſaid to be frivolous & vain, where they may have a good and plain intendment, but rather the word (April) which is repugnant to it ſhall be ſaid to be void and a meer negation; but it ſeems to him that as the Award is, the caſe being that at any time within 20 daies after the Award made, the one oꝛ the other diſliking the Award, might have been defeated upon the payment of 10 s. if the 10 s. had been paid within four daies, as it might have been, and befoꝛe the Releaſes made the party by the intent of the Award had not been bound to have made the Releaſes, becauſe that by it within the time befoꝛe the Releaſes made, the Arbitrement ſhall be defeated by the Condition if it had been a good Award, and therfoꝛe it ſhall not be ſaid to be a finall Award at the time of the Award made, becauſe that inſtantly upon it, beforꝛe the four daies are paſſed, there was power in the ſaid parties to have defeated the Award upon the payment of the ſaid 10 s. and therfoꝛe it ſeems to himſelf alſo that the Award was void, and by conſequence the Plaintiff ſhall be barred.

6. KIng Richard the 3. by his Letters Patents granted to the Burgeſſes of Gloceſter and to their Succeſſoꝛs, that the Town of Gloceſter, &c. ſhall be a County of it ſelf, ſeveral and diſtinct from the County of Gloceſter foꝛ ever, and no part of that County, and ſhall be called the County of the Town of Gloceſter; notwitheſtanding ſaving and reſerving to himſelf and his Heirs, that the Juſtices of Aſſiſe in the County of Gloceſter, the Juſtices of Goal-delivery, and of the Peace, in holding of their Seſſions, and alſo the Sheriff of the County of Gloceſter in holding of his County-Courts, and every of them may freely enter into the ſaid Town, and keep the ſaid Seſſions and County-Courts, of, and foꝛ any thing and matter ariſing out of the ſaid County of the Town aforeſaid, and within the ſaid County of Gloceſter, as beforꝛe time they had accuſtomed to hold them there, the ſaid Grant oꝛ any other thing notwithſtanding. And grants further, that they ſhall have a

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Major, two Sheriffs, and one Recorder, within the ſame County of the Town of Gloceſter, and that the Miniſters of the Sheriff of the County ſhall not afterwards enter to do or execute any thing there which to their Office of Sheriff appertaineth, or any waies to intermeddle with it, except only for the Sheriff of the County of Gloceſter, to hold their County-Courts as is aforeſaid: And that the Major & Aldermen of the ſaid Town for the time being, & their Succeſſors, having power and authority to enquire here & determine all things which Juſtices of P. or Juſtices aſſigned, to hear & determine Treſpaſſes and Miſdemeanors within the County of Gloceſt. before this time have made or exerciſed: And that the Juſtices of Peace, of him, his Heirs, or Succeſſors within the ſaid County of Gloceſter, ſhould not intermeddle with the things or cauſes which belong to the Juſtices of Peace within the ſaid Town, &c. And upon this Charter divers things were moved by Sir William Periam Knight, now chief Baron of the Exchequer; before his going into the Circuit.

1. Whether, by the ſaving of the Charter they have ſufficient power reſerved to them to ſit within the Town, being now exempted from the ſaid Town of Gloceſter, to enquire there of the Felonies done in the ſaid County of Gloceſter; And ſo for the Aſſiſes and Niſi prius taken there of things made in the County of Gloceſter. Then if the the Sheriffs may execute their Warrants made there at the time of the Aſſiſes or Goal-delivery, notwithſtanding the exemption given to them by the Patent.

And it was agreed by all the Juſtices that the ſaving in the Patent is ſufficient for the Juſtices of Aſſiſe and Goal-delivery to ſit there for the things which happen within the County of Gloceſter, for as the King may by his Letters Patents make a County, and exempt this from any other County, ſo may he in the making of it ſave and except to him and his Succeſſors ſuch part of the Juriſdiction or priviledge which the other County from which it is exempted, had in it before; As in divers places of the Realm, the Goal of a Town which is a County of it ſelf, or which is a place priviledged from the County, is the Goal of the County, and the place where the Aſſiſes or Goal-delivery is holden, is within the County of the Town, and yet ſerve alſo for the County at large; as in the Seſſions Hall at Newgate, which ſerves as well for the County of Middleſex as for London, and yet it ſtands in London, but by uſage it hath alwaies been ſo, and nothing can be well preſcribed unto by uſage which cannot have a lawfull beginning by Award or Grant, and this by the diviſion of London from Middleſex at the beginning might be ſo. And ſo the Goal of Bury, &c. And although that the words are, ſaving to him and his Heirs, yet by the word (Heirs) it ſhall be taken for a perpetual ſaving, which ſhall go to his Succeſſors, which is the Queen, and the rather becauſe it is a ſaving for Juſtice to be done to the Subjects, which ſhall be taken as largely as it can be: And albeit the expreſſe ſaving for the Sheriff is but for to hold his turn, yet in as much as the authority of the Juſtices of Aſſiſe and Goal-delivery in holding their Seſſions as before was accuſtomed is ſaved, it is included in it, that all which appertain to the execution of this Service, is alſo ſaved, or otherwiſe the ſaving ſhall be to little purpoſe: And therefore that the Sheriff, or other Miniſter made by the authority of theſe Courts, is well made there and warranted by the Charter: And wee ought the rather to make ſuch expoſition of the Charter, becauſe it hath been alwaies after the Charter ſo put in execution by all the Juſtices of Aſſiſe: But it ſeems that by this Commiſſion for the County a thing which happens in the Town cannot be determined, albeit it be Felony commited in the Hall during the Seſſions, but by a Commiſſion for the Towne it may.

Vide this case reported in *Coke, lib.* 7. 12, 13.

7. SIr Francis Englefield Knight, being seised in his Demesne as of Fee, of the Mannor of Englefield, in the County of Berks, and of divers other Lands, in the first year of Queen Eliz. departed out of the Realm by licence of the Queen for a time, and remained out of the Realm in the parts beyond the Seas above the time of his licence, whereby the Queen by her Warrant under her privy Seal required him to return, upon which he was warned, but did not come, whereupon the Queen seised his Land for his contempt; After which the Statute of Fugatives was made 13. year of the Queen, upon which by Commissions found upon this Statute, all his Lands were newly seised, and afterwards 17 Eliz. by Indenture made between him and Francis Englefield his Nephew, and sealed by the said Sir Francis at Rome, the said Sir Francis covenanted with his said Nephew, upon consideration of advancement of his Nephew, and other good considerations to raise an use, that he and his Heirs and all others seised of the said Mannor, &c. shall hereafter stand seised of them to the use of himself for term of his life, without impeachment of Wast, and afterwards to the use of his Nephew, and of the Heirs Males of his body, and for default of such Issue, to the use of the right Heirs and Assigns of the said Francis the Nephew for ever, with a Proviso, that if the said Sir Francis shall have any Issue Male of his body, that then all the said Uses and Limitations shall be void: and with a Proviso further, that if the said Sir Francis by himself or any other, shall at any time during his life, deliver or tender to his said Nephew a Ring of Gold, to the intent to make the said Uses and Limitations void, that then the said Uses and Limitations shall be void, and that thereafter the said Mannors, &c. shall be as before. Afterwards the said Francis was attainted of Treason supposed to be committed by him, 18 Eliz. A Le umures in partibus transmarinis, & le attainder fuit primerment. utlagary & apres. per act de Par. 28 Eliz. by which the forfeiture of the Condition was given to the Queen, and at the same Parliament it was also enacted, that all and every person or persons which had, or claimed to have any Estate of Inheritance, Lease, or Rent then not entred of Record, or certified into the Court of Exchequer, of, in, to, or out of any Mannors, Lands, &c. by or under any Grant, Assurance, or Conveyance whatsoever, had or made at any time after the beginning of the Raign of her Majesty, by any persons attainted of any Treasons mentioned in the said Act after the 8. day of February, 18 Eliz. within two years next ensuing the last day of the Session of the said Parliament, shall openly shew in the said Court of Exchequer, or cause to be openly shewn there the same, his, or their Grant, Conveyance, or Assurance, and there in the Term time in open Court, the same shall offer and exhibit, or upon his or their Oath affirming that they have not the same, nor can come by it, or that it was never put in writing, then the effect thereof to be entred and inrolled of Record, or else every such conveyance and assurance should be void and of none effect, to all intents and purposes; saving to every person and persons (other then to parties and privies to such conveyance & such as shall not exhibit the said conveyance according to the true meaning of this Act) all such Rights, &c. whereupon the said Francis the Nephew, the 20. day of Novem. 30 Eliz. in his own person affirmed upon his Oath that he had not the said conveyance, nor knew not how to come by it, but delivered the effect of the assurance, omitting the time when it was made, otherwise then that it was made after the beginning of the Queens Raign, and before the Treason committed by the said Sir Francis, and before the Statute made 13 Eliz. against Fugatives, and omitting also the last clause of the Condition for the tender of the said Ring; and this he offered openly in the Court of Exchequer the same day: after which the Queen being moved with the said Condition, made a Warrant per Letters Patens under the great Seal, dated 17. Martii 31 Eliz. to Richard Broughton

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and Henry Bourchier Eſquires, for her and in her place and ſtead, to deliver or tender to the ſaid Francis the Nephew a Ring of Gold, to the intent to make void the Uſes and limitations limited by the ſaid Indenture, and to return their proceedings upon it into the Court of Exchequer, whereupon they made a tender of a Ring of Gold to the ſaid Francis the Nephew, the 18. day of March, 31 Eliz. which he refuſed to receive; And the two years after the ſaid Seſſion of Parliament was the 23. day of March, 31 Eliz. And the ſaid Broughton and Bourchier returned all this that they had done as before, with the Commiſſions into the Exchequer, according to the Commiſſion: And upon this at the Parliament holden 35 Eliz. upon an Act which then was to paſſe touching the Land and Attainder of the ſaid Sir Francis, diverſe queſtions were moved amongſt all the Judges and Barons then there; whereof

1. The firſt was, whether the effect of the Aſſurance made by Sir Francis was delivered into the Exchequer according to the intent of the Act, becauſe it wanted the time when it was made, and alſo one of the Proviſo's? And upon good deliberation they all did agree that it was not put in according to the purport of the ſaid Act, for the time may be materiall to be known, for the fraud which by the ſame Statute might be averred to be in the making of this Conveyance, and for the better tryall of the validity of the aſſurance and of the cauſe of it, therfore the true effect therof ought to be delivered or ſhewn in writing to be entred of Record, becauſe the Queens Councell may ſee and underſtand by it whether the Queen might have Title to it, or not; and how can this be if it doth not appear when it was done? And for the Condition how can the Queen by preſumption come to the notice of it, if it be not ſhewn to her? And this was one principall matter of the effect of the ſaid aſſurance which ought to have been ſhewn, for this ſhewing ought to be for the benefit and advantage of the Queen, and not ſo much for the advantage of the party. And here the effect of it which ſhall ſhew for the Queen is omitted, and therfore not ſhewn in writing according to the purport and intent of the Statute, which was, that by it the Queen and her Councell may ſee what will make for her in the Grant, Conveyance, or Aſſurance.

2. Whether this Condition were given to the Queen, becauſe that the words in this Indenture precedent to the Condition, are theſe; viz. Becauſe that the ſaid Francis the Nephew might happen to be of evill behaviour and government; the ſaid Sir Francis provided as before, which (as was alledged) was founded upon a particular regard and reſpect, which was proper to himſelf, and therfore cannot be transferred to the Queen; and it doth not appear that he yet had been of ill behaviour: But this notwithſtanding, all agreed that this Condition is in the Queen by the attainder of the ſaid Sir Francis, as well by the Act of his Attainder, as by the Act of 33 H.8. which give the forfeiture of Conditions alſo expreſly in the caſe of Treaſon.

3. Whether there ought to be an Office for finding the performance of the Condition according to the Warrant, and all agreed that there need not, becauſe that when any man is to do a thing by Warrant of Letters Patents for the Queen, to be returned in any Court, it ſufficeth for him to return it, which he hath done according to the Letters Patents, with the Warrant it ſelf, and then that which is ſo returned, is as well of Record as if it were found by Office and returned of Record; and ſo it was agreed in the Exchequer, about 16 Eliz. in the caſe of Edward Dacres, who had made an Aſſignment of his Goods and Chattells to Sir Alexander Culpepper and others, who afterwards was attainted of Treaſon by Outlawry, and the Condition adjudged to be forfeited to the Queen by the Statute of 33 H.8. and a Warrant was made by Letters Patents to Sir Thomas George to perform the Condition, who did it, and returned that he had done it accordingly, whereby the aſſurance to the ſaid Sir Alexander and his Companions was avoided, and all the Goods and Chattels of the ſaid Edward forfeited to

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the Queen, and all this was in the Queen without Office found, for that which the Sheriff or other Minister doth by virtue of any Writ or Warrant which is to be of Record, when it is returned of Record, it is as well of Record as the Writ or Warrant it self, so here, &c.

4. But the greatest question was (which was not any thing in the case here) whether the Estate made to Francis the Nephew were void, eo instanti upon Hillary Term finished 31 Eliz. although the two year after the Session of Parliament, 28 Eliz. did not end untill the 28. day of March, 31 Eliz. in as much as no Term was or could be within two years after it, in which the assurance or the effect of it might be shewn openly in the Court of Exchequer, or that it shall tarry to be void untill the two years are fully expired; as if a man make assurance of his Land upon condition, that if he do not go to Rome within two years next ensuing, that it shall be to the use of I.S. and his Heirs, and he stay untill a week within the end of the two years, in so much as it is not possible to perform it within the two years, yet the use doth not change untill the two years are past; but in this case it ought to be shewn a Term within the two years, which is as much as to say, that if the Terms be all past, so as it cannot be done after it within the two years, the Assurance eo instanti upon the finishing of the last Term is become void; as if an Assurance be upon condition, that if in the Term time, within two years he do not levy a Fine to I.S. and his Heirs, &c. now if the last Term passe without the Fine, the Use change, albeit the two years be not expired; si Parolls fort Plea; And there is great diversity where an Estate is to be defeated, or an Use is to be raised upon an Act to be done, or not done, within a time certain, within two years, and where within two years generally, for in the first case the Use change upon the Act done, or not done immediatly, and in the other not untill the two years are finished, because that by presumption alwaies within two years the Act may be done for any thing of which the Law takes conusance. But if the Act to be done, or not done, refer to any time certain within the two years, as if he do not pay 10l. to one before the Feast of S. Michael the Arch-angel within the two years, that then the Use shall change, or the Estate shall be void, in these cases immediatly upon the last Feast of S. Michael the Arch-angel, within the two years the Use change, or the Estate shall be void, as the case is, and shall not tarry untill the full end of the two years to do it, for in the words themselves the diversity appeareth.

8. AT the same time there was another Indenture shewn to the said Judges, bearing date the 4. day of May, 1 Eliz. made between the said Sir Francis Englefield of the one part: And Sir Edward Fitton, and Sir Ralph Egerton Knights, of the other part, and inrolled in the Exchequer, according to the Statute of the 30. day of October, 30 Eliz by which the said Francis for him and his Heirs covenanted with them, that as well in consideration of a Marriage had and solemnised between John Englefield, brother of the said Sir Francis, and Margaret Fitton, Sister to the said Sir Edward, and for the augmentation and interest of the Joynture of the said Margaret, as for other good causes and reasonable considerations, the said Sir Francis especially moving, the said Sir Francis before the Feast of S. John Baptist, then next ensuing, would assure Lands within the County of Warwick, of the value of 60 l. a year to the said Sir Edward and Sir Ralph, and their Heirs, to the use of the said Margaret for her life, and for her Joynture, for part of it, and for the remainder that it shall also be to the use of the said Margaret for her life, in case that the Lady Anne then the wife of the said Sir Francis, should recover her Dower of the said 60 l. a year.

And the said Sir Francis for him and his Heirs, did further covenant with the said Sir Edward and Sir Ralph, that if it should happen that the said Sir Francis

Francis ſhall die without Iſſue Male of his body, the ſaid Iohn or any Iſſue of his body upon the body of the ſaid Margaret begotten then living, that then after the death of the ſaid Sir Francis, as well the Manno of Englefield, as all his other Lands (making eſpeciall mention of them) ſhould be and might deſcend, remain, revert, continue or be in poſſeſſion or reverſion to the ſaid Iohn Englefield, and to the Heirs Males of his body upon the body of the ſaid Margaret lawfully begotten, if the ſayd Iohn were then living, or to the Heirs Males of the body of the ſayd Iohn upon the body of the ſayd Margaret lawfully begotten, without any Act or Acts, Thing or Things made, or to be made by the ſayd Sir Francis to the contrary therof.

And upon this, it was moved, that there was a variance between this Deed now ſhewn, and this Inrolement, and that therfore it doth not appeare, whether this Deed was ſhewn in the Court or delivered there according to the Statute therof made, 28 Eliz. for in the Deed it is (for other good cauſes) and this word (good) is not compriſed within the Inrolement.

But as to it, all the Iudges and Barons agreed, that albeit theſe defects hapned by the negligence of the Clerk in writing and examining, this Inrollement remaines good, in as much as the omiſſions are in matters and words which are of abundance, and not in that which is any ſubſtance of the Deed.

But the Lords of Parliament which were Committees of this caſe in the Parliament, ſent for the Record of the ſayd Inrolement, and would have had this to have been amended in the Chamber next to the Parliament; but as the Officer was in doing of it, the Iudges adviſed that it ſhould not be done, as well becauſe this was not the place where it ought to be amended, but the Court of Exchequer if it were, or needed to be amended: And alſo becauſe that the two years after the Seſſion of Parliament of 28 Eliz. was then paſt.

Then it was moved whether by the Covenant and conſiderations aforeſaid, the uſe ſhall paſſe or were raiſed to Iohn Englefield, or now to his ſon Francis, Nephew to the ſaid Sir Francis, and begotten upon the body of the ſayd Margaret. And all agreed that it is not for divers reaſons.

1. Becauſe it is, that if it happen that Sir Francis die without Iſſue Male, that then it ſhall be to Iohn as before, if he be then living, or to the Heirs Males of his body as before, which is in the diſjunctive, to wit, that it ſhall remain to Iohn, or to his Heirs Male of his body, which cannot raiſe any uſe, but found only in Covenant for the incertainty, and alſo it is upon a future contingent, to wit, if the ſaid Iohn be then living.

2. Becauſe the Covenant is, that it ſhall come or deſcend, &c. in the diſjunctive, and if he had covenanted that it ſhall deſcend to Iohn after his death without Iſſue Male, it had been cleer that no uſe had been raiſed by it, for it ſhall be but a meer Covenant, to wit, that he ſhall leave it to deſcend to him; and here it being in the diſjunctive it cannot be any other then a bare Covenant, to wit, that he ſhall ſuffer it to deſcend, or otherwiſe by conveyance to come to Iohn, after his death without Iſſue Male, the one, or the other at his pleaſure.

And yet further, that it ſhall deſcend, come, or remain to Iohn in poſſeſſion or reverſion, ſo that he may make the one or the other void at his pleaſure, which cannot be, if an Uſe ſhall be raiſed by it, and therfore alſo it enures but as a bare Covenant, which he may perform either the one or the other way at his pleaſure.

Alſo it is, that it ſhall ſo deſcend or come to Iohn without any act or thing done or to be done by him to the contrary, whereby alſo it fully appeareth, that the aſſurance of the ſaid Iohn ſhall ſtand for all this Land upon the Covenant, and not upon any uſe which was to be altered or changed by it.

But if an Uſe may change by the Manor upon the conſideration, yet it ſhall not change to the ſaid John or his Iſſues, untill the death of the ſaid Sir Francis without Iſſue Male, becauſe that untill that happen, if the ſaid John had been living, he had not had any Uſe, becauſe it is that he ſhall have the Land then if he be then living, and if it ſhall not be in him untill this time, it ſhall not be in his Son untill Sir Francis be dead without Iſſue; for it is if the ſaid John or any Iſſue Male of his body, &c. be then living, then it ſhall deſcend, come, or remain, &c. ſo that it doth not come to them untill it may appear whether the ſaid John, or any Iſſue Male of his body upon the body of the ſaid Margaret, be in rerum natura, when Sir Francis ſhall be dead without Iſſue Male, and therfore it yet remains upon a contingent, whether the uſe ſhall be to the Heirs Males of the body of the ſaid John, if it ſhall be ſaid that it is an Uſe, and therfore in the mean time the entire Fee-ſimple remains in Sir Francis, not yet changed, but for the Eſtate tail it ſelf in himſelf, if any change ſhall be, as appeareth before that it ſhall not be, and therfore by the attainder of the ſaid Sir Francis, the whole Fee-ſimple is now all forfeited to the Queen, before that the uſe may be to the Heirs Males of the body of the ſaid John: And the Queen ſhall not come to this Land in any privity by the ſaid Sir Francis, but in the Poſt by the Eſcheat, and therfore the poſſeſſion of the Queen now, or of her Patentee ſhall never be changed with this Uſe, which ſhall never be carried out of any other poſſeſſion but ſuch which remaineth in privity untill the uſe is to come in Eſſe, no more now then as it might at common Law before the Statute of Uſes, 27 H. 8. And this as to the future Uſe was the opinion of Popham, and ſome other of the Juſtices. And nota 21 H. 7. plito. 30. If a man covenant in conſideration of the Marriage of his Son, that immediatly after his death his Land ſhall evert, remain, or deſcend to his Son, to him and the Heirs of his body, or to him and his Heirs for ever, that this is but a bare Covenant, and doth not change any Uſe; And what diverſity then is there in the caſe of Sir Francis Engleſield, who covenants that it ſhall deſcend or remain in poſſeſſion, or revert. And as it ſeems the great difficulty which was in the caſe of Sir Robert Conſtable, which was put by Gerard Attorney-generall, 6 Eliz. and it appeareth in Dyer 1. Mar. was becauſe that the Covenant was, that it ſhall be to the Son in poſſeſſion or uſe, which for the incertainty in as much as it was in them to leave the one or the other, or perhaps the Eſtate of their Land was ſuch, that part was in poſſeſſion and part in uſe, and therfore according to the intent taken rather for a Covenant then for matter ſufficient to change the uſe: But it was ſo that it was never helped by any right which he had, but by the grace of the Queen he enjoyed it.

Eaſter Term, 35 Eliz.

Crocker *and* York, *verſus* Dormer.

1. UPon a Recovery had by John Crocker and George York, againſt Geffrey Dormer, in a Writ of Entry in the Poſt, of the Manor of Farningho, with the Appurtenances, and of 6 Meſſuages, 6 Cottages, &c. in Farningho, and of a yearly Rent or penſion of 4 Marks iſſuing out of the Church or Rectory of Farningho, and of the Advowſon of the Church of Farningho, in the County of Northampton, William Dormer Son and Heir of the ſaid Geffrey, brought a Writ of Error, and aſſigned diverſe Errors.

1. Becauſe that ſuch a form of Writ doth not lye of an Advowſon, but only a Right of Advowſon, Darrein preſentment and Quare impedit.

2. Becauſe he demands the Advowſon of the Rectory, and alſo a Rent iſſuing out of the ſame Rectory.

3. Be-

3. Becauſe the Demand for the Rent is in the Diſjunctive, to wit, a Rent or a Penſion.

4. Becauſe it is a penſion, wheras a Penſion is not ſutable in our Law, but in the Spirituall Court; To which Gawdy ſaid, that there is a great diverſity between a common Recovery, which is an aſſurance between parties and a Recovery which is upon Title, for a common Recovery is to an Uſe, to wit, to the uſe of him againſt whom it is had, if no other uſe can be averred, and therfore as to the Uſe, it is to be guided according to the intent of the parties, and by a common Recovery had againſt Tenant for life, he in the Reverſion if he be not party or privy to it, may enter for a forfeiture, as it was adjudged very lately in the Exchequer, by the advice of all the Juſtices in the caſe of a Recovery had againſt Sir William Petham Knight, and in all theſe things it is otherwiſe in caſe of a Recovery upon Title, and therfore in as much as this common Recovery is but a common Aſſurance between parties, and is alwaies by aſſent between parties, to the end that they may make aſſurance from one to another, there ſhall be and alwaies hath been a contrary expoſition to a Recovery which is by pretence of Title, and it hath been common to put in ſuch Recoveries, Advowſons, Commons, Warrens, and the like, and yet alwaies allowed: And if this ſhall be now drawn in queſtion, infinite Aſſurances ſhall by this be indangered, which the Law will not ſuffer, and therfore the demand of an Advowſon and Penſion in the Writ of Entry makes not the Writ vitious, as it ſhall do in another Writ of Entry founded upon a Title and not upon an Aſſurance. And as to that, that the Rent and the Advowſon alſo is demanded, this is good, becauſe the Advowſon is another thing then the Rectory it ſelf, out of which the Rent is demanded to be iſſuing: And for the diſjunctive demand of the Rent or Penſion, it makes no matter in this caſe, becauſe it is a common Recovery in which ſuch a preciſe form is not neceſſary to be uſed as in other Writs, and alſo a Penſion iſſuing out of a Rectory is the ſame with the rent: To which Clench and Fennor agreed in all; but Popham moved that the greateſt difficulty in this caſe is the demand made to the diſjunctive, to wit, of the annuall Rent or Penſion, for if a Penſion iſſuing out of a Rectory ſhall be ſaid to be a thing meerly ſpirituall, and not to be demanded by our Law, or meerly of another nature then the Rent it ſelf, with which it is conjoyned by the word (or) then it is erroneous; for albeit a common Recovery, be now a common aſſurance of Land paſt by the aſſent of parties, and therfore hath another conſervation, then that which paſſeth by pretence of Title, yet we are not to omit groſſe abſurdities in ſuch common Recoveries, as to demand an acre of Land or Wood in the Manor of Sale, or Dale, or black acre, or white acre, theſe are not good in common Recoveries, becauſe there is no certainty in the demand which of them the party is to recover, which kind of abſurdity is not to be admitted in theſe Recoveries; for this is but a meer ignorance in the Law and the Miniſters of it. And to this Gawdy and the other Juſtices agreed, but they ſayd, that a Penſion iſſuing and a Rent ſhall be taken for all one; for if a man grant a Penſion of 20 s. a year, iſſuing out of the Manor of D. or of the Rectory of S theſe are Rents iſſuing out of them: and if the demand had been of an annuall Rent, or Annuity of 20 s. a year iſſuing out of the Rectory, this had been good. To which Popham agreed, and yet ſayd, if it had been an annuall Rent of 20 s. &c. or of an Annuity of 20 s. it had not been good, becauſe that the word (iſſuing) is not referred to the Annuity, but to the Rent only, and therfore are meerly generall, and not as the ſame, but if the demand were of an annuity, rent, or payment of 20 s. iſſuing out of a Rectory, it is good, for this is but one and the ſame. Then it was alledged that notwithſtanding that which appears to the Court, it cannot be taken that this was a common Recovery, for upon the aſſignment of the Error, it is not averred that it was a common Recovery

very, to which Popham ſaid, that common Recoveries are ſuch common Aſſurances to all perſons that are well known to all, and eſpecially to us that they need not be averred, for they are known by certain Marks, to wit, by the voluntary entry into the Warranty, the common Voucher and the like: And at laſt they all agreed that the Judgment ſhall be affirmed.

2. In Waſt, by Thomas Haydock againſt Richard Warnford, the caſe was this; One Michael Dennis was ſeiſed in his Demeſne as of Fee, of the third part of a Meſſuage, and of certain Lands in Bury Blunſden in the County of Wilts, and being ſo ſeiſed the laſt of April, 9 Eliz. demiſed them to Suſan Warnford for 41. years, from the Feaſt of S. Michael the Arch-angel then next enſuing, who aſſigned this over to Richard Warnford, after which the ſaid Michael Dennis by bargain and ſale enrolled, according to the Statute conveyed the Reverſion to John Simborn Eſquire, and his Heirs, the ſaid Iohn being then ſeiſed of another third part therof in his Demeſne as of Fee, after which, to wit, the firſt day of Iune, 17 Eliz. the ſaid Iohn Simborn demiſed the ſaid third part, which was his before his ſaid purchaſe to the ſaid Richard Warnford for 21 years then next enſuing, and afterwards the ſaid Iohn Simborn died ſeiſed of the Reverſion of the ſaid two parts, and this deſcended to Barnaby Simborn his Son and next Heir, who the 20 of Iune, 28 Eliz. by bargain and ſale enrolled, according to the Statute conveyed, be Reverſion of the ſaid two parts to the ſaid Thomas Haydock and his Heirs, after which the ſaid Richard Warnford committed Waſt in the ſaid houſe, wherupon the ſaid Thomas Haydock brought an action of Waſt againſt him, according to the ſaid two ſeverall Leaſes, and aſſigned the Waſt in ſuffering the Hall of the price of 20 l. a Kitchin of the price of 20 l. and ſo of other things to be uncovered, wherby the great Timber of them became rotten, and ſo became ruinous, to the diſinheriſon of the Plaintiff, and upon a Nihil dicit, a Writ was awarded to enquire of Damages, in which it was compriſed that the Sheriff ſhall go to the place waſted, and there enquire of the ſaid Damages, who returned an inquiſition taken therof at Bury Blunſden, without making mention that he went to the place waſted, and that it was taken there, wherupon Judgment was given in the common Bench, that the ſaid Plaintiff ſhall recover his Seiſin againſt the Defendant of the ſaid places waſted, with their Appurtenances Per viſum Iurator. Inquiſitionis predict. & damna ſua occaſione vaſti in eiſdem locis in triplo ſecundū formam ſtatuti, &c. And upon this a Writ of Error was brought in the Kings Bench, and there by all the Juſtices it was agreed that it was but Surpluſage to comprehend in the Writ of enquiry of Damages, that the Sheriff ſhall go to the place waſted, and there enquire of the Damages, in as much as by the not denying therof, the Waſt is acknowledged, and therfore he need not go to the place waſted: But where a Writ is awarded to enquire of the Waſt upon default made at the grand Diſtreſſe, there by the Statute of Weſt. 2. cap. 24. the Sheriff ought to go in perſon to the place Waſted, and enquire of the Waſt done, and therfore in that caſe it is needfull to have the clauſe in it, that the Sheriff ſhall go to the place waſted, and there enquire of it: for by the view the Waſt may be the better known to them, but where the Waſt is acknowledged, as here, that clauſe need not, and albeit it be comprehended in the Writ, yet the Sheriff is not therby bound to go to the place waſted, and to enquire there, but he may do it at any place within his Bayliwick where he will, and therfore it is no error in this point: And they agreed alſo that the Waſt is well aſſigned in the entire Hall, &c. although the Action were brought but upon the Demiſes of two third parts of it, and it cannot be done in theſe parts, but that it is done in the whole, and alſo it cannot be done in the whole, but that it is alſo done in the three parts, but yet the doing therof is not to the diſinheritance of the Plaintiff, but in theſe two third parts; and therfore no error in this manner of aſſigning of

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the Waſt. And they alſo agreed that the Action is well brought upon theſe ſeverall Demiſes, becauſe neither the intereſt of the Term, nor of the Inheritance was ſevered nor divided to ſeverall perſons at the time of the doing of the Waſt, but the two Terms in the one, to wit, in Warnford, and the Inheritance of theſe immediatly in the other, to wit, in Haydock; And by Popham alſo, the thing in which the Waſt is aſſigned, is one and the ſame thing and not diverſe, to wit, a Meſſuage, and therfore by Brudnell and Pollard, 14 H.8. 10. if ſeverall Demiſes are made of one and the ſame Meſſuage by one and the ſame perſon, as one part at one time, and another part at another, an Action of Waſt may well lye: Albeit Fitzherbert and Brook ſeem therin to be of a contrary opinion, and that ſeverall Actions of Waſt ought to be in that caſe.

And the exception was taken, becauſe the Judgment was entred that he ſhall recover the place waſted, Per viſum Jurator. prædict. wheras they had not the view of it in this caſe, for this ſhould be where it is given upon a Writ awarded to enquire of the Waſt upon default made at the grand Diſtreſſe; whereas here the Waſt is not denied but acknowledged.

But as to this, ſeverall Preſidents were ſhewn, the one upon Demurrer for part, Hill. 1. Mariæ. Rot. 301. and another Tr. 31. H.8. Rot. 142. in an Information, in both which Caſes the Judgment was entred as here, to wit, Per viſum Jur. prædict. and yet in theſe, the Waſt was as acknowledged: Whereupon it was ordered that the Judgment ſhould be affirmed.

3. In an Ejectione firmæ brought by Sir Moyle Finch Knight, Plaintiff againſt John Riſley Defendant, for a Meſſuage and a Mill in Raveſton in the County of Buckinghamſhire, the caſe for the matter in Law appeared ſhortly to be this.

The King and Queen Philip and Mary by their Letters Patents, dated the eight of July, 3. & 4. of their Raign, made a Leaſe of the Reverſion of the Manor of Raveſton (of which this was parcell) to Sir Robert Throgmorton for ſeventy years, from ſuch a Feaſt, after the death of the Counteſſe of Ormond, who then had it for her life, rendring yearly 73 l. 13 s. payable at the Feaſts of Saint Michael the Arch-angel, and the Annunciation of our Lady, at the receit of the Exchequer by equall portions, with a Proviſo that the Leaſe ſhall ceaſe, if the ſaid Rent or any part therof were arrear, and not paid at the ſaid Feaſt, or a certain time after, the Reverſion deſcend to the now Queen, and the ſaid Counteſſe died 7 Eliz. part of the Rent then payable, was not paid at the day, nor within the time limited by the Proviſo, afterwards Queen Elizabeth by her Letters Patents, dated 30. May, 30 Eliz. granted the ſaid Manor to the ſaid Sir Moyl, and one Awdeley and their Heirs in Fee, with a clauſe in it, that the Letters Patents ſhall be good, notwithſtanding there be not any recitall of any Leaſes or Grants at any time before that made by her, or any of her Progenitors; after which an Office is found for the Queen, that the Rent was arrear and not paid as before, after which the ſaid Sir Moyl and Awdeley aſſured the ſaid Manors by bargain and ſale to Sir Thomas Hennage who demiſed the ſaid Meſſuage and Mill to the ſaid Sir Moyl, upon whom the ſaid Riſley entred in right of the ſaid Leaſe made by the ſaid King Phillip and Queen Mary, under Thomas Throgmorton, who then pretended to have the term of the ſaid Leaſe from Sir Robert his Father. The caſe was well argued at the Bar, and now at the Bench, where Fennor moved firſt, Whether it were a Condition. 2. Whether an Office were requiſite. 3. Whether this Office found, comes ſoon enough for time: For the firſt he conceived that it was a conditional Limitation, for a Limitation is that which limits an Eſtate certain or doubtfull, as Quandiu in manibus noſtris fore contigerit, quamdiu amicus ſit, or dummodo ſolverit: And there (dummodo)

was a Condition as appeareth, 5 Aſſ plit. 9. & 2. Aſſ. a Grant made to J.S. and his Heirs tam diu, as the Grantor and his Heir ſhall enjoy ſuch a Manor, this is a Limitation, and a Limitation alwaies determines the Eſtate, but a Condition albeit it be broken during the Eſtate, yet it doth not determine the Eſtate, and ſo it is of a conditional Limitation, and therfore tis not in the King untill an Office be therof found, for the King ſubmits himſelf to the Law, for Bracton ſaith, Quod non debet judicare ſed ſecundum legem, and his Prerogative is ſo excellent, that he cannot take a part with any thing, but by matter of Record, neither can he draw the Right or Poſſeſſion of any one in queſtion upon a bare ſurmiſe, but by Office or other matter of Record, for a Record alwaies carries credit with it. And there is no diverſity where two matters are limited in Deed, and where one is limited in a Deed, and the other by the Law: And the contrary objections are eaſily anſwered, for when the Tenant in tail of the King dies without Iſſue. it is in the King without Office, becauſe the Law does not help them which contemn it. But in caſe of an Office which is forfeited, it is in the King to diſpoſe without Office, becauſe the King is not to have the Office it ſelf but the diſpoſition of it, and yet it is to be defeated by Scire facias in the Chancery.

If a Will be demiſed for life, upon condition that he ſhall not let it but to a Milner, and he breaks the Condition, in caſe of the King there muſt be an Office to avoid it, and there the Office entitles the King to the Condition and not to the Entry, for after the Office it is not in the King untill Entry: And here the Rent may be paid to the Kings Bayly in the Country, which is matter in fait, and therfore ſhall not be defeated without Office; And here the Office comes too late to give any advantage to the Patentee, for the King cannot grant a Title of Entry before Office, no more then the Aſſignee of a common perſon can take advantage of a Condition broken in the time of the Grantor, of which the Grantor did not take advantage in his time; And if the Queen makes a Leaſe durante beneplacito, the Patentee ſhall not avoid it, as it appears in the Lord Burgleighs caſe, and therfore the Office here ſhall not help the Patentee, but the Queen for the mean profits: for although nullum tempus occurrit Regi, yet the Patentee ſhall not take advantage of this Prerogative.

Clench agreed cleerly, that it was a Limitation, but yet that it is at the Queens liberty to avoid or make it good, for perhaps the Rent is better then the value of the Land, and upon this reaſon a Leaſe from the King Probis hominibus de dale, or to a Monk rendring rent, is good, which otherwiſe had been meerly void: And by the Office found, the Election of the Queen appeareth, without which the Leaſe is to continue, and therfore the Patentee ſhall not defeat that which happened in the Queens time before.

Popham, to ſay that the Office helps the Queen for the mean Profits, and that now the Patentee ſhall not take advantage to avoid the Leaſe is too abſurd; for the Queen cannot take advantage to have the mean Profits, but in reſpect of the avoidance of the Leaſe: And if the Leaſe were made void or determined againſt the Queen, it ſhall not remain good and of force againſt the Patentee, and alſo to ſay, that the Leaſe might have its continuance, after that it is determined by the Limitation comprehended in the Writing, by reaſon of a reſervation, is alſo too abſurd, for ſo it may be ſaid, that if the Queen make a Leaſe for years, if J.S. ſhall live ſo long, rendring rent, that this Leaſe may have continuance after the death of J.S. which cleerly is not Law; And the Patentee here ſhall take the advantage to avoid the Leaſe happned before his Patent made, becauſe that no Office need to be found of the not payment before it paſſed from the Queen to make it void, and the reaſon is, becauſe this Proviſo (as it is penned) is a meer Limitation of the Eſtate, and not any manner of Condition; And therfore if the Queen

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make a Leaſe for 100. years, if the Leſſee ſhall ſo long lawfully pay the Rent reſerved at the day of payment, if he fail of payment of the Rent reſerved at the day limited, the Leaſe is ipſo facto determined, and it need not be found by Office. And what diverſity is there where the Limitation is conjoyned to the eſtate it ſelf, and where it cometh in by a Proviſo afterwards, all being in one and the ſame Deed, and therfore ſpoken at one and the ſame time, for the one and the other caſe manifeſteth that the contract and agreement is, that the Leaſe ſhall not continue longer then the default of the payment of the Rent.

And in this caſe, ſuppoſe that the Queen had granted over the Land? ſhall not the Patentee have advantage to avoid the Leaſe, becauſe that no Office was found before? It is cleer that he ſhall, or otherwiſe this is now become to be an abſolute Leaſe for a hundred years, which is not Law, for it is meerly contrary to the Contract, and therfore abſurd to be maintained: I agree with the generall rule that nothing ſhal paſſe to, or from the Queen but by matter of Record; but this makes nothing againſt me in this caſe, for here the ſame Record which paſſeth the Eſtate to the party, to wit, the Patent of the Leaſe contains the time how long it ſhall endure, longer then which it cannot continue: And therfore by 9 H.7. If the King makes a Gift in tail, and the Donee dies without Iſſue, the Land is in the King without Office, ſo in every other caſe where the Eſtate is determined according to the limitation, for he cannot be put out of poſſeſſion wrongfully, and now hath right to hold it againſt him. And I ſay that no warrant or authority can be found throughout the whole Law where a Leaſe or Eſtate made by the King is determined by an expreſſe limitation compriſed in the Patent it ſelf of the Grant, that there need not any Office or other thing to determine it, for that which is compriſed in the ſame Patent may determine it, of it ſelf.

And further, wheras the Proviſo is, that the re-entry ſhall be for default of payment of the Rent, and the like, there the Term continues untill the re-entry be made, notwithſtanding the Condition be broken, as appeareth by all the Juſtices, 28 H.8. becauſe it is expreſly limited that it ſhall be defeated by the re-entry, & there before re-entry be made, the Action of Waſt ſhall be, quod tenet: And by 12 H.7. where a common perſon is put to his Entry, there the Queen is put to an Office, with which agrees Stamford in his Book of Prerogative: But in this caſe, if it were between common perſons, the Leaſe ſhall be determined upon default of payment of the Rent, and before any re-entry, and therfore in the Queens caſe it ſhall be determined without Office. But if the caſe had been, that if the Rent had been arrear and not paid, that thereupon re-entry made, it ought to ceaſe, there an Office had been neceſſary to countervail the Entry in caſe of the Queen, or otherwiſe the Leaſe ſhall not ceaſe, becauſe the Queen cannot make an Entry but by ſuch means, and therfore it ought to be by matter compriſed in the Patent. It hath been ſaid, that this ſhall be a conditionall Limitation, and that therfore an Office is neceſſary; but I ſay, that here is not any matter or quality of a Condition, but meerly of a Limitation, and tis rather a contingent Limitation then any manner of Condition, and this is well proved by 11 H.7. which is, that the Grantee of a Reverſion ſhal take advantage of it at common Law, the which he cannot do if it ſavour any way of a Condition, and by 27 H. 8. a Proviſo in a Deed ought alwaies to be expounded according to the purport, becauſe that it is placed in a Deed, ſomtimes for a Condition, as where a Proviſo is that the Leſſee ſhall not alien; ſomtimes for an exception, as where a Proviſo is, that the Leaſe ſhall not extend to ſuch an acre, or ſuch a thing, ſomtimes for a Limitation, as here, and in the like caſes. And in this caſe the releaſe of the Rent ſhall make it, that the Leaſe ſhall never be determined for the not payment of it, becauſe that afterwards there cannot be any ſuch default of payment; and therfore in ſuch a caſe the Limitation remaineth

maineth abſolute and diſcharged of the contingent, which otherwiſe had determined it: As if a man make a Leaſe for a 100. years, if the Leſſee in the mean time do not cut ſuch a Tree, a releaſe of all Conditions will not ſerve, yet if the Leſſor himſelf or any other but the Leſſee cut it, the Leaſe is become abſolute for a 100. years: And ſo upon this point my conceit appeareth. But the moſt colourable thing which hath been alledged on the other ſide, was by my Brother Drew, which was, that in counting upon an Ejectione firmæ, and pleading in ſuch a Leaſe as here, it ſhall be as an abſolute Leaſe for the years compriſed in the Habendum, without making any mention of the Prouiſo, upon which he enforced it that it ſhall be taken to be of more efficacy then if it ſtood meerly upon the Contingent; for he ſaid, that upon a Leaſe made for years, if the Leſſee ſhall ſo long live, and the like, in the count, and alſo in the pleading mention ought to be made of the life of the Leſſee: I agree it to be true that the pleading ſhall be ſo, for in count counting, and in plea pleading, if the matter of the Contingent precede the Limitation, or be annexed to the Limitation, there a man ought to ſpeak to the Contingent, or otherwiſe it is not good, as by 14 H. 8. it ſhall be of a Condition where it is precedent; But in caſe of a Condition it is quite otherwiſe, for if a man make a Leaſe to another for years, Si tamdiu vixerit, or Dummodo ſolverit, &c. or the like, which are annexed to the limitation of the Eſtate; in all theſe caſes in counting and alſo in pleading, he ought to aver the life of the Leſſee, or otherwiſe the contents of the thing according to the limitation: But where that which was the Limitation cometh by a Proviſo, after the Habendum which diſtinguiſheth the ſentence as here, there, becauſe it it is a matter diſtinct and ſubſequent from the Habendum, and not annexed to it, he need not to ſpeak of it, but there it ſhall alwaies come in to be ſhewn of the other part, and this is the uſuall and common caſe of difference for pleading, but this makes no difference of the Eſtate; And therfore if an Obligation be made with a Condition endorſed, the Plaintiff in debt upon it doth not ſpeak of the Condition in his Count, but if the Condition be precedent, or ſtands compriſed within the body of the Obligation, then he ought to ſpeak of it in his Count, as appeareth by 28 H. 8. where a man was bound in twenty quarters of Malt, to be paid at ſuch a day, and if he fail, that he ſhall pay forty quarters at ſuch a day, if he demand the forty quarters in his count, he ought to ſhew the default of payment of the twenty quarters at the day limited for it, and yet the Condition that is out of, and that which is comprehended within the Obligation are but as one for the ſubſtance, but for the form it differs as to the pleading, which form ought to be obſerved.

Another reaſon is in this caſe, becauſe that the payment of the Rent is limited to be made at the receit of the Exchequer, in which caſe if it had been paid, the payment had been entred of Record, and not being ſo, the default appeareth of Record, and where the default appeareth of Record, there needs no Office, for it ſhall be in vain to make that to appear upon Record by Office, which otherwiſe appeareth of it ſelf by Record, and therfore in 4. and 5. of Phil. & Mary it appeareth, where Sir John Savage was Sheriff of the County of W. in Fee, and that he was indited of two ſeverall voluntary eſcapes of Felons, and for not keeping of his Turn in loco conſueto upon two Inſtruments removed into the Kings Bench in 8 H. 8. upon the motion of the Attorney-generall the Office was ſeiſed into the Kings hand without Scire facias, or any Inquiſition found therof, and as appeareth 3 Eliz. One Blake who by Patent was the Kings Remembrancer in the Exchequer being made one of the Barons of the ſame Exchequer, the other Office was ipſo facto gone and determined, & there need no inquiſition to be made of it, nor Scire facias to avoid it, becauſe the taking of the Office of a Baron is of Record; And a man cannot be a Judge and a Miniſter in one and the ſame Court, and therfore the firſt Office is determined by taking of the ſecond, and there need

no

no Office to be found of it, the matter it ſelf being apparant upon Record, and therfore as it appeareth it was adjudged in 13 H.8. that a new Patent of the ſame Office of Remembrancer making recitall of the former Patent (which appeared as before upon Record to be void) with a clauſe Quod poſt mortem five determinationem, &c. therof, the new Grant ſhall take effect, was void. And Englefields caſe was lately adjudged in the Exchequer (and at the Parliament 35 Eliz. allowed to be good Law by all the Juſtices there being) where the Queen had a Condition given to her by forfeiture upon an Attainder of Treaſon to be performed by the payment of a ſumm of money, or the like: If the Queen makes a Warrant by Patent to one to perform the Condition, and to return his proceedings therupon into the Exchequer, who performs it accordingly, and therupon returns all that he hath done with his Warrant into the Exchequer, no Office need to be found of the performance of the Condition, becauſe that by the return (which is warranted by the Patent) the Condition appeareth ſufficiently upon Record to be performed, and therfore no Office need to be found, no more of the not-payment in this caſe. It hath been ſaid by ſome, that it may be that the Patentee hath tendred the Rent at the receit, and that they would not receive or record the receit of it, and that then it ſhould be hard that he ſhould looſe his Leaſe, no default being in him: to which I ſay, ſuppoſe a man be bound to make his appearance in any of the Kings Courts, may he ſay, that he appeared there according to the Obligation, & excuſe himſelf by ſuch bare averment therof, unleſſe his appearance be entred of Record? It is cleer that he cannot, as appeareth by 18 E.4. for appearance in a Court of Record, is not unleſſe it be of Record, yet it may be ſaid, that then the caſe may be had to the party: as if the Officer will not record his appearance, which is the ſame miſchief as in this caſe, but this will not help him, for firſt the Law preſumes that every Officer will be indifferent betwixt party and party; and upon this opinion had of him he is admitted to his Office, wherupon the Law preſumes that if the party would have appeared, that the Officer would have recorded it, and in as much as he did not do it, it ſhall be taken that he did not appear. But the ſtrongeſt reaſon in the caſe is this, to wit, if default be not in the party to do that which he ought to do, but in the Officer to do that which belongeth to his Office, as to record that which he ought to record, there the Officer ſhall be chargable to the party in an Action upon the caſe, to anſwer him ſo much in Damages as he hath ſuſtained by ſuch default of the Officer, and the Law will put the party rather to ſuch a recovery then to anſwer it by a bare matter of averment which ought to be of Record. And further ſuch a voluntary default may be a forfeiture of his Office, and ſo a ſufficient penalty in caſe of an Officer. And to ſay, that the Office of Receit is not an Office of Record, is too abſurd, for it is a principall member and part of the Court of Exchequer, and as wel of Record, for the matters belonging to it, as the Offices of the Pipe and Remembrancers are for thoſe things which belong to them; and the Records of Receit as well inrolled in Rolls of Parchment as any other Records of the Queen in this, or any other Court, & it is commonly uſed now to convey Reverſions & Remainders to the Queen, with a Proviſo to be void upon payment of a certain ſum of mony to the Queen at the receit of the Exchequer, & it is as uſual upon payment made there to have it back again without office found of this paym. and what is the reaſon of it now, but becauſe the paym. there is alwaies entred upon Record, & therfore no Office needs make this paym. to appear upon Record. And for the caſe of Sir Rob. Cheſter, 4 Eliz. there is great diverſity between that & this caſe, for it is ordained by the Act that upon the default of paym. (which is not limited there to be made at the receit) the office ſhal be forfeited, & not that the eſtate in the office ſhall ceaſe: And of a thing forfeited it is at the election of him who is to take advantage of the forfeiture, whether he will take it or not, and till the advantage taken therof the party ſtill remains an Officer.

And therfore if the Queen make a Leaſe for years, and the Termer makes a Feoffment in Fee, the Term by this is extinct, as was agreed upon an Evidence in the Exchequer 28 El. in the caſe of Drayton Baſſet, and before that, in the ſame caſe in the Kings Bench, and yet no reverſion is drawn therby out of the Queen. Suppoſe then that the Queen before any Office found therof, grant the Land over in Fee, ſhall not the Patentee take advantage therof by extinguiſhing the Term? It is cleer that he ſhall, and albeit a Termer holdeth over his Term, yet the Patentee of the Queen, and alſo the Bargainee of a common perſon after the Inrolement of the Bargain ſhall take advantage of this determination of the Term.

And for the not reciting of Throgmortons Leaſe in the Letters Patents made to Finch and Audeley, it is to no purpoſe to ſpeak to it, becauſe the Eſtate was finiſhed before the Grant; And further, becauſe there was a Non obſtante in the Patent, that it ſhall be effectuall, notwithſtanding any not recitall of any Leaſe being of Record, or not being of Record, miſrecitall, &c. which was by all at the Bench admitted to be good, and not contradicted by any.

And for the Office found after the Grant made, I did not ſpeak to it, becauſe it is of no purpoſe to help the Patentee, but yet ſhall ſerve the Queen for the mean profits, as hath been ſaid: See more of this caſe, Trin. 36 Eliz. pl. 2.

Trinity Term 35 *Eliz.*

Hughes *verſus* Robotham.

1. MEredith Hughes brought an Action upon the Caſe againſt William Robotham Executor to Ja. Robotham, for that the Plaintiff in the life time of the ſayd Teſtator, to wit, the 12th. of April, 28 Eliz. at London, in ſuch a Pariſh and Ward, was poſſeſſed of a Meſſuage, with the Appurtenances, in the ſame Pariſh and Ward, for divers years then to come; And wheras alſo the ſaid Teſtator was then poſſeſſed of the reverſion therof after divers years then alſo to come, and ſo poſſeſſed the ſaid Teſtator the ſaid 12th. day of April, at London, in the Pariſh and Ward aforeſaid, in conſideration that the Plaintiff at the inſtance and requeſt of the Teſtator in his life time would ſurrender all his Eſtate and Term of years which he then had to come in the ſaid Meſſuage, with the Appurtenances, and procure one Thomas Thornell to give to the ſaid Teſtator a 100. marks for a Leaſe therof to be made by the ſaid Teſtator to the ſaid Thornell, he aſſumed and promiſed to pay to the Plaintiff 30 l. of the ſaid 100. marks, when he ſhould be therunto required by the Plaintiff.

And the Plaintiff alledged in facto, that he at the inſtance and requeſt of the ſaid Teſtator in his life time afterwards, to wit, the 20th. day of April, 28 Eliz. at London, in the Pariſh and Ward aforeſaid, ſurrendred to the ſaid Teſtator all the Eſtate and term of years which he then had to come in the ſaid Meſſuage, &c. and that he, the ſame 20th. day of April, in the ſame Pariſh and Ward, procured the ſayd Thornell to give to the ſaid Teſtator 100. marks for a Leaſe of the ſaid Meſſuage, &c. by the Teſtator to the ſaid Thornell, then and there made for 19 years, from the Feaſt of the Annunciation of our Lady then laſt paſt, and that yet the ſaid Teſtator in his life time, nor the ſaid Defendant after his death, have not paid to him the ſaid 30 l. albeit the ſaid Teſtator in his life time, to wit, the 24. day of April aforeſaid, at London, in the Pariſh and Ward aforeſaid, as therunto required by the ſaid Plaintiff, and albeit the Defendant after the death of the ſaid Teſtator, to wit, the 10th. day of April, 32 Eliz. in the Pariſh and Ward aforeſaid, was alſo

alſo therunto required by the ſaid Plaintiff: And albeit there were ſufficient Goods and Chattels of the ſaid Teſtator at the time of his death, to pay as well the ſaid 30l. as all other Debts of the ſaid Teſtator, and alſo to diſcharge the Funerals of the ſaid Teſtator, which Goods and Chattels came to the ſaid hand of the ſaid Defendant, &c.

And after Non aſſumpſit pleaded, and a Verdict for the Plaintiff, exception was taken in arreſt of Judgment, that the Declaration was not good.

1. Becauſe it is, that the Plaintiff the 20th. day of April, 28 Eliz. ſurrendred all the Eſtate and term which he had then to come, and this (for any thing ſhewn) may be another Term then he had the 12th. day before, for it is not ſaid, and ſo being poſſeſſed the 20th. day he ſurrendred, but generally as before.

And further the conſideration was, that he ought to ſurrender all the Term which he had the 12th. day of April, which cannot be made the 20th. day, for in the mean time, part of the Term is incurred, and therfore the purpoſe was that the ſurrender ſhould have been made immediatly as ſoon as might be, ſo as by the delay therof the ſaid Robotham ſhould not loſe any part of the Term to come.

And it was further alledged, that a term for years cannot be ſurrendred to another Term for years.

Gawdy, The conſideration is, that the Plaintiff at the requeſt of the Teſtator in his life time ſhould ſurrender, ſo that it is not to be done untill he be required by the Teſtator, and not inſtantly at his perill without requeſt precedent; and here it is alledged that the Plaintiff at the requeſt of the ſaid Teſtator, the 20th. day of April ſurrendred, which is well done, and according to the agreement, and albeit it had been more formall to have ſaid that the ſaid Plaintiff ſo being poſſeſſed afterwards, to wit, the 20th. day of April, ſurrendred, &c. yet it ſhall not be intended that he had any other term then that which he had before, if it be not ſhewn on the other ſide in his Bar, and eſpecially here, where the Action is not grounded upon the Term, but upon the Aſſumpſit, and the conſideration is nothing but an inducement to the Aſſumption, which is not ſo formall to be made as if the Action had been grounded upon the Term it ſelf. And therfore in an Action upon the caſe upon an Aſſumpſit, it ſufficeth to ſay, that wheras the Defendant was indebted to the Plaintiff in divers ſumms of money amounting in all to a 100l. the Defendant aſſumed to pay him the 100l. at ſuch a day, without ſaying, how or in what manner theſe Debts accrued, or when, becauſe the Action is not meerly founded upon the Debt but upon the promiſe, and the Debts are but inducements to it: But if it were to recover the Debts themſelves in an Action of Debt there ought to be made a certainty therof, to wit, when, and how it comes.

And further here, in as much as the Aſſumpſit is found for the Plaintiff, it ſhall be implyed that the conſideration was duly performed, for without due proof of the conſideration the Plaintiff hath failed of his aſſumption, and therfore alſo it ſhall be now taken that the Teſtator hath ſuch a term of years in reverſion, to which the term for years in poſſeſſion may be ſurrendred, for he ſaid, that he who hath ten years in poſſeſſion may well ſurrender to him who hath more years, as twenty in reverſion; for the leſſer may ſurrender to the greater term. To all which Popham and Fennor agreed: And Popham ſaid further, although it ſhall be taken moſt ſtrongly againſt Hughes, to wit, that Robotham had a leſſer term in the reverſion then Hughes had in the poſſeſſion, yet the ſurrender ſhall be good, for in Law it is greater and more beneficiall for him to have a leſſer term to be a term in poſſeſſion, then to have it to be in reverſion: And by him, if a Leſſee for twenty years make a Leaſe for ten years, then he which makes the Leaſe for ten years hath a reverſion upon theſe ten years, ſo that if Rent be reſerved upon it, he may diſtrain

ſtrain for it and have Fealty of the Termor: And if he grant the Reverſion over for ten years, with attornment of the Termor in poſſeſſion, the Grantee hath the Reverſion and ſhall have the Rent for the time, and yet the Remainder for years remains alwaies to the Grantor, and therfore before the Reverſion granted over, the Termor for ten years in poſſeſſion might have ſurrendred to his Leſſor, and therby the ſaid Leſſor ſhall have ſo many of the ſaid years which were then to come of his former term of twenty years; And after the Reverſion granted, he, which hath the ten years may ſurrender to the Grantee of ten years in Reverſion, and there he ſhall have ſo many years in poſſeſſion which were to come of his Reverſion, Quod nota bene: And if he had had a leſſer term in the Reverſion then the Leſſor himſelf had in the Poſſeſſion, it ſhall go to the benefit of the firſt Termor for twenty years, who was his Grantor, for the Term in poſſeſſion is quite gone and drowned in the Reverſion to the benefit of thoſe who have the Reverſion therupon, having regard to their Eſtate in the Reverſion, and not otherwiſe; to all which Fennor agreed, wherupon Gawdy gave the rule that Judgment ſhall be entred for the Plaintiff: But Popham ſaid, that if the conſideration for the ſurrender had not been ſufficiently alledged, that the Plaintiff ſhould not be helped by the other conſideration of 100. marks given by Thornell, for if ſuch an Aſſumption as this is be founded upon two more conſiderations, and ſuch which by poſſibility may be performed, then the party hath failed of his Suit: As if a man in conſideration of 5 s. paid, and of other 5 s. to be paid at a day to come, aſſume to do a thing, or to pay money, if the one 5 s. be not paid, or if it be not averred that the other 5 s. was paid at the day limited for the payment of it, the party hath failed in his aſſumption in the one caſe, and the declaration is inſufficient in the other caſe, for he hath made a departure from his conſideration: But if one of the conſiderations be impoſſible, or againſt Law, there the other conſiderations which are poſſible, or ſtand with the Law ſuffice if they be well alledged. And he ſaid, that the Executor ſhall be charged with the contract of the Teſtator by common courſe of the Court, which ſtands upon reaſon, for if an Action of Debt upon a bare contract be brought againſt an Executor, if he do not demur upon it but plead to the Pais, that he owes him nothing, and it is found againſt him, he ſhall be thereby charged of the Goods of the dead; and the cauſe why he may be helped by demurring upon the declaration in that caſe, is, becauſe the Teſtator might have waged his Law in that caſe of debt, which the Executor could not do of other contracts, and therfore ſhall not be charged with it by ſuch an act, if he will help himſelf by demurrer; but in the aſſumption of his Teſtator, he could not have waged his Law: and it is founded upon the death of the Teſtator, to wit, his debt, with which the Executor by a mean may be charged as before, and therfore the aſſumption in ſuch a caſe maintainable againſt the Executor. But if the Teſtator upon good conſideration aſſume to make aſſurance of Land, or to do any other ſuch collaterall thing which doth not ſound in a duty of a thing payable, there the Executor ſhall never be charged with ſuch an aſſumption to render recompence for it. And to this agreed all the Juſtices of the common Bench, and Barons of the Exchequer; And ſuch an aſſumption hath not been allowed in the Kings Bench but of late time, and that but in one or two caſes. But in the other caſe it hath been common and of long time uſed, and therfore now too late to be drawn in queſtion; and if it ſhould be, it may be maintained with good reaſon in this caſe of a duty of a thing payable, in as much as the Teſtator cannot wage his Law in the Action, but in the other caſe there is no reaſon nor courſe of the Court to maintain it: But the Judges in the Exchequer Chamber reverſed all theſe Judments in both caſes.

2. Nota

2. Nota, that this Term was adjourned to Octob. Trin. and becauſe the Writ was, that Adjournment ſhall be made in Octob. Trin. of all caſes, untill Tres Trinitat. the Adjournment was made in every of the Courts of Kings Bench, Common Bench, and the Exchequer, the very firſt day of Octob. Trin. then it was holden by the Juſtices, that the Adjournment ought not to have been made untill the ſitting of the Court the fourth day from Octabis.

And becauſe that the Writs were, that at the ſaid Tres Tr. the Term ſhall be holden thereafter, as if no Adjournment had been, the Juſtices held that they ought to ſit the firſt day of the ſaid Tres Trin. and ſo from thence every day untill the end of the Term, and for all cauſes, as if no adjournment had been; and ſo they did accordingly, ſaving by aſſent ſome of the Juſtices did not come thither by reaſon of their far diſtance from London, at the end of the Term upon the laſt Adjournment: But they held, that if it had not been for the eſpeciall words in the Writ, which were, that it ſhall be then holden as if no Adjournment had been, the Eſſoines had been the firſt day of Tres Trin. and the full Term had not been untill the fourth day, which was the laſt day of the Term, quod nota, and ſo it was of the Adjournment which happened firſt at Weſtminſter, and afterwards at Hertford from Michaelmas Term now laſt paſt.

Michaelmas Term 35 *and* 36 *Eliz.*

Gravenor *verſus* Brook *and others.*

1. IN an Ejectione firmæ by Edward Gravenor Plaintiff, againſt Richard Brook and others Defendants, the caſe appeared to be this; Henry Hall was ſeiſed in his Demeſne as of Fee, according to the cuſtom of the Mannor of A. in the County of D. of certain cuſtomary Tenements holden of the ſaid Mannor called Fairchildes and Preachers, &c. In the third year of Henry the 8th. (before which time the cuſtomary Tenements of the ſaid Mannor had alwaies been uſed to be granted by Copy of Court Roll of the ſaid Mannor in Fee-ſimple, or for life or years, but never in Fee-tail but then) the ſaid Henry Hall ſurrendred his ſaid Copy-hold Land, to the uſe of Joane his eldeſt Daughter for her life, the remainder to John Gravenor the eldeſt Son of the ſaid Joane, and to the Heirs of his body, the Remainder to Henry Gravenor her other Son, and the Heirs of his body, the Remainder to the right Heirs of the ſaid Henry Hall for ever; wherupon in 3 H. 8. at the Court then there holden, a grant was made by Copy of Court Roll accordingly, and Seiſin given to the ſaid Joane by the Lord accordingly.

Henry Hall died, having Iſſue the ſaid Joane and one Elizabeth, and at the Court holden within the ſaid Mannor, 4 H. 8. the death of the ſaid Henry Hall was preſented by the Homage, and that the ſaid Daughters were his Heirs, and that the Surrender made as before was void, becauſe it was not uſed within the ſaid Mannor to make Surrenders of Eſtates tails, and thereupon the ſaid Homage made diviſion of the ſaid Land, and limited Fairchilds for the purparty of the ſaid Joane, and Preachers for the purparty of the ſaid Elizabeth, and Seiſin was granted to them accordingly.

Elizabeth died ſeiſed of her ſaid part, after which 33 H. 8. Margaret her Daughter was found Heir to her, and admitted Tenant to this part; after which Joane dyed ſeiſed of the ſaid Tenements as the Law will.

And after the ſaid Margaret takes to Husband one John Adye, who with his ſaid wife ſurrendred his ſaid part to the uſe of the ſaid John Adye and of his ſaid wife, and of their Heirs; and afterwards the ſaid Margaret died without Iſſue, and the ſaid John Adye held the part of his ſaid wife, and ſurrendred it to the uſe of the ſaid Richard Brook, and of one John North, and their Heirs who were admitted accordingly, after which, the ſaid John Gravenor died without Iſſue, and now the ſaid Henry Gravenor was ſole Heire to him, and alſo to the ſaid Henry Hall who had Iſſue Edward Gravenor, and dyed, the ſaid Edward entred into the ſaid Lands called Preachers, and did let it to the Plaintiff, upon whom the ſaid Richard Brook and the other Defendants did re-enter and eject him. And all this appeareth upon a ſpeciall Verdict.

And by Clench and Gawdy, an Eſtate tail cannot be of Copyhold Land, unleſſe it be in caſe where it hath been uſed, for the Statute of Donis conditionalibus ſhall not enure to ſuch cuſtomary Lands, but to Lands which are at common Law, and therfore an Eſtate tail cannot be of theſe cuſtomary Lands, but in caſe where it hath been uſed time out of mind, and they ſaid, that ſo it hath been lately taken in the Common Bench; But they ſaid, that the firſt remainder limited to the ſaid John Gravenor here upon the death of the ſaid John, was a good Fee-ſimple conditional, which is well warranted by the cuſtom to demiſe in Fee, for that which by cuſtom may be demiſed of an Eſtate in Fee abſolute, may alſo be demiſed of a Fee-ſimple conditionall, or upon any other limitation, as if I. S. hath ſo long Iſſue of his body, and the like, but in ſuch a caſe no Remainder can be limited over, for one Fee cannot remain over upon another, and therfore the Remainder to the ſaid Henry was void: But they ſaid, that for all the life of the ſaid John Gravenor, nothing was in the ſaid Elizabeth which could deſcend from her to the ſaid Margaret her Daughter, or that might be ſurrendred by the ſaid Margaret and her Husband, and therfore the ſaid Margaret dying without Iſſue, in the life time of the ſaid John Gravenor who had the Fee-ſimple conditionall, nothing was done which might hinder the ſaid Edward, Son to the ſaid Henry Gravenor of his Entry, and therfore the ſaid Plaintiff ought to have his Judgment to recover, for they took no regard to that which the Homage did, 4th. year of Hen. 8.

But Fennor and Popham held, that an Eſtate tail is wrought out of Copyhold Land by the equity of the Statute of Donis conditionalibus, for otherwiſe it cannot be that there can be any Eſtate tail of Copyhold Land, for by uſage it cannot be maintained, becauſe that no Eſtate tail was known in Law before this Statute, but all were Fee-ſimple, and after this Statute it cannot be by uſage, becauſe this is within the time of limitation, after which an uſage cannot make a preſcription, as appeareth 22 & 23 Eliz. in Dyer: And by 8 Eliz. a Cuſtom cannot be made after Weſtm. 2. And what Eſtates are of Copyhold land, appeareth expreſly by Littleton, in his Chapter of Tenant by Copyhold, &c. And in Brook Title, Tenant by Copyhold, &c. 15 H. 8. In both which it appeareth that a Plaint lyeth in Copyhold Land in the nature of a Formedon in the Deſcender at common Law, and this could not be before the Statute of Donis conditionalibus for ſuch Land, becauſe that before that Statute there was not any Formedon in the Deſcender at common Law, and therfore the Statute helps them for their remedy for intailed Land which is cuſtomary by equity: And if the Action ſhall be given by equity for this Land, why ſhall not the Statute by the ſame equity work to make an Eſtate intail alſo of this nature of the Land? We ſee no reaſon to the contrary; and if a man will well mark the words of the Statute of Weſtm. 2. cap. 1. he ſhall well perceive that the Formedon in Deſcender was not before this Statute, which wills that in a new caſe a new remedy may be given, and therupon ſets the form of a Formedon in Deſcender: But as to

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the Formedon in the Reverter, it is then ſaid, that it is uſed enough in Chancery, and by Fitzherbert in his Natura brevium, the Formedon in the Deſcender is founded upon this Statute, and was not at Common Law before; And the reaſon is, becauſe theſe Copyholds are now become by uſage to be ſuch Eſtates that the Law allows them to be good againſt the Lords themſelves, they performing their Cuſtoms and Services, and therfore are more commonly guided by the guides and rules of the common Law, and therfore as appeareth in Dyer, Tr. 12. Eliz. Poſſeſſio fratris, of ſuch an Eſtate, facit ſororem eſſe hæredem. And to ſay that Eſtates of Copyhold Land are not warranted but by cuſtom, and every Cuſtom lies in Uſage; and without Uſage a Cuſtom cannot be, is true, but in the Uſage of the greater the leſſer is alwaies implyed: As by Uſage, three lives have been alwaies granted by Copy of Court Roll, but never within memory, two, or one alone, yet the grant of one or two lives only is warranted by this Cuſtom, for the uſe of the greater number warrants the leſſer number of lives, but not è converſo: And ſo Fee-ſimples upon a Limitation. or Eſtates in tail are warranted by the equity of the Statute, becauſe they are leſſer Eſtates then are warranted by the Cuſtom, and theſe leſſer are implyed as before in the greater, and none will doubt but that in this caſe the Lord may make a Demiſe for life, the Remainder over in Fee, and it is well warranted by the Cuſtom, and therfore it ſeems to them that it is a good Eſtate tail to John Gravenor, and a good Remainder over to Henry his Brother, and if ſo, it follows that the Plaintiff hath a good Title to the Land, and that Judgment ought to be given for him. And for the dying ſeiſed of Elizabeth, they did not regard it, for ſhe cannot dye ſeiſed of it as a Copyholder, for ſhe had no right to be Copyholder of it: And by the dying ſeiſed of a Copyholder at common Law, it ſhall be no prejudice to him who hath right, for he may enter; But here in as much as ſhe cometh in by admittance of the Lord at the Court, her Occupation cannot be fortious to him, and therfore no deſcent at common Law by her dying ſeiſed, for it was but as an Occupation at Will. But if it ſhall not be an Eſtate tail in John Gravenor, as they conceive ſtrongly it is, yet for the other cauſes alledged by Gawdy and Clench, Judgment ought to be given for the Plaintiff, and the Remainder which is not good ſhall not prejudice the Fee-ſimple conditionall granted to John, which is no more then if the Surrender had been to the uſe of John Gravenor and his Heirs, the Remainder over, becauſe that we as Judges ſee that this cannot be good by Law, and therfore not to be compared to the caſe where the Cuſtom warrants but one life, and the Lord grants two joyntly or ſucceſſively, there both the one and the other is void: And this is true, becauſe the cuſtom is the cauſe that it was void, and not the Law, and alſo it is a larger Eſtate then the Cuſtom warrants, which is not here, and upon this Judgment was given that the Plaintiff ſhall recover.

And by Popham, it hath been uſed, and that upon good advice in ſome Manors, to bar ſuch Eſtates tails by a common Recovery proſecuted in the Lords Court, upon a Plaint in nature of a Writ of Entry in the Poſt.

2. JUlius Ceſar Judge of the Admiralty Court, brought an Action upon the Caſe for a Slander againſt Philip Curtine a Merchant-ſtranger, for ſaying, that the ſaid Ceſar had given a corrupt Sentence; And upon not guilty pleaded, and 200. marks Damages given, it was alledged in arreſt of Judgment, where it was tryed, by Niſi prius at the Guildhall by a partiall Inqueſt, becauſe that upon the default of ſtrangers, one being challenged and tryed out, a Tales was awarded De circumſtantibus by the Juſtice of Niſi prius; whereas (as was alledged) a Tale could not have been granted in this caſe, for the Statute of 35 H. 8 cap. 6. which gives the Tales is to be intended but of commontryals of Engliſh, for the Statute ſpeaks at the beginning but of ſuch

Juries

Juries, which by the Law ought to have 40 s. of Free-hold, and wills that in ſuch caſes the Venire facias ought to have this clauſe, Quorum quilibet habeat 40 s. in terris, &c. which cannot be intended of Aliens which cannot have Free-hold: And it goes further that upon default of Jurors, the Juſtices have authority at the Prayer of the Plaintiff or Defendant, to command the Sheriff or other Miniſter to whom it appertaineth to make a return of ſuch other able perſons of the ſaid County, then preſent at the ſame Aſſiſes or Niſi prius which ſhall make a full Jury, &c. which cannot be intended of Aliens but of Subjects, and therfore ſhall be of tryals which are onely of Engliſh, and not of this Inqueſt which was part of Aliens.

And further the Tales was awarded only of Aliens, as was alledged on the Defendants part, but in this point it was a miſtake, for the Tales was awarded generally de circumſtantibus, which ought alwaies to be of ſuch as the principall Pannell was. But Per Curiam the exceptions were diſallowed, for albeit the Statute is, as hath been ſaid, yet when the Statute comes to this clauſe, which gives that a Tales may be granted by the Juſtices of Niſi prius, and is generally referred to the former part of the Act, for it is added; Furthermore be it enacted, that upon every firſt Writ of Habeas Corpora, or Diſtringas with a Niſi prius, &c. the Sheriff, &c. ſhall return upon every Juror 5 s. Iſſues at the leaſt, &c, which is generall of all: And then it goes further, And wills, that in every ſuch Writ o Habeas Corpora, or Diſtringas with a Niſi prius where a full Jury doth not appear before the Juſtices of Aſſiſe, or Niſi prius, that they have power to command the Sheriff, or other Miniſter to whom it appertains, to nominate ſuch other perſons as before, which is generall in all places where a Niſi prius is granted, and therfore this is not excepted neither by the Letter nor intent of the Law. And where it is ſaid (ſuch perſons) by it, is to be intended ſuch as the firſt, which ſhall be of Aliens, as well as Engliſh, where the caſe requires it, for expedition was as requiſite in caſes for, or againſt them, as if it were between other perſons. And Aliens may well be of the County or place where the Niſi prius is to be taken, and may be there: for although an Alien cannot purchaſe Land of an Eſtate of Free-hold within the Realm, yet he may have a houſe for habitation within it, for the time that he is there, albeit he be no Deniſon, but be to remain there for Merchandiſe, or the like: And by Gawdy, where the default was only of ſtrangers, the Tales might have been awarded only of Aliens, as where a thing is to be tryed by Inqueſt within two Counties, and thoſe of the one County appear, but not thoſe of the other, the Tales might be of the other County only.

Davies *verſus* Gardiner.

3. AN Action upon the caſe for a Slander was brought by Anne Davies againſt Iohn Gardiner; That wheras there was a Communication of a Marriage to be had between the Plaintiff and one Anthony Elcock, the Defendant to the intent to hinder the ſaid Marriage, ſaid, and publiſhed, that there was a Grocer in London that did get her with Child, and that ſhe had the Child by the ſaid Grocer, wherby ſhe loſt her Marriage. To which the Defendant pleaded not guilty, and was found guilty at the Aſſiſes at Ayleſbury to the Damages of 200. marks: And now it was alledged in Arreſt of Judgment, that this matter appeareth to be meerly ſpirituall, and therfore not determinable at common Law, but to be proſecuted in the ſpirituall Court. But per Curiam the Action lies here, for a woman not maried cannot by intendment have ſo great advancement as by her Marriage, wherby ſhe is ſure of maintenance for her life, or during her Marriage, and Dower and other benefits which the temporall Laws gives by reaſon of her Marri-

Vide this caſe reported, *Cook lib.* 4. 16. *b.*

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age, and therfore by this ſlander ſhe is greatly prejudiced in that which is to be her temporall advancement, for which it is reaſon to give her remedy by way of Action at common Law: As if a woman keep a Victualling houſe, to which divers of great credit repair, wherby ſhe hath her livelyhood, and one will ſay to her Gueſts, that as they reſpect their credits, they take care how they they uſe ſuch a houſe, for there the woman is known to be a Bawd, wherby the Gueſts avoid her houſe, to the loſſe of her husband, ſhall not ſhe in this caſe have an Action at common Law for ſuch a ſlander? It is cleer that ſhee will. So, if one ſaith, that a woman is a common Strumpet, and that it is a ſlander to them to come to her houſe, wherby ſhe looſeth the advantage which ſhe was wont to have by her Gueſts, ſhe ſhall have her Action for this at common Law.

So here upon theſe collaterall circumſtances, wherby it may appear that ſhe hath more prejudice then can be by calling of one Harlot, and the like.

And Judgment was given for the Plaintiff.

Hillary Term, 36 Eliz. in the Kings Bench.

IN Michaelmas Term, 33, & 34 Eliz. Rot. 181. William and Joane his wife, Adminiſtratrix of Andrew Stock, brought an Action upon the Caſe upon an Aſſumpſit, made to the Inteſtate for the payment of 5 l. to William Stock, who imparled untill Tueſday next after, Octa. Hillary next, which was the 24th. day of January, and then the Defendant demanded Oyer of the Letters of Adminiſtration which were entred, in hæc verba.

Wherby it appeareth that the Letters of Adminiſtration were committed to the ſaid *Joane* by *Thomas Taylor* Batchelor of Law, Commiſſary to the Biſhop of *London*, *&c.* wherby the Defendant pleaded, that after the laſt continuance, the ſaid Letters Patents of Adminiſtration, ſealed with the Seal of the Vicar Generall of the ſaid Biſhop, which he uſeth in this behalf, and brought here into Court, bearing date the 27th. day of *January* 1591. which was three daies after the continuance, committed the Adminiſtration to the ſaid Defendant. And pleaded further the Act of 37 H. 8. which ſayes, that it ſhall be lawfull hereafter for any perſon, being a Doctor of the Law, to be Chancellor, Commiſſary, or to exerciſe Eccleſiaſticall Juriſdiction, albeit he were a meer Lay perſon, ſo that ſuch a perſon be a Doctor as aforeſaid, and avers, that at the time of the committing of the Adminiſtration to the ſaid Joane, the ſaid Thomas Taylor was a meer Lay perſon, and not Doctor Legis civilis nec miniſter allocatus, according to the Laws of the Church of England, wherby he had no lawfull power to commit the Adminiſtration.

Upon which it was demurred generally, and by all the Court the Plaintiff had Judgment to recover; for we are to conſider what our Law was in this caſe before this Statute of 37 H. 8. And albeit a Doctor then affirmed, that the Canon Law was, that there was a meer nullity in ſuch Adminiſtration, ſo although the party that did it, not being a Clark nor Doctor, according to the Stat. of 37 H. 8. yet all the Juſtices agreed, that the Adminiſtration ſo committed will be adjudged in our Law to be of force and effect, being ſhewn under the Seal of the Officer and committed by him, who is reputed the Officer, who ought to do it, and is inveſted in the Office untill it be avoided by ſentence, and yet ſuch an avoidance ſhall not make a mans act to be made void, no more then if a meer Lay-man be preſented to a benefice, albeit this be a meer nullity in our Law, and void, yet we adjudge the Church full, according to the publike admiſſion, conſtitution and induction, and not according to the capacity of the perſon, which is a thing ſecret, untill ſuch a one be deprived for it by ſentence in the ſpirituall Court, and yet the Church ſhall be in our Law void but from the time of deprivation, of which notice ought to be given to the Patron.

So here, he remains as to our Law an Officer untill his authority be defeated by ſentence of the ſpirituall Court, otherwiſe great miſchief will happen; for an infinite number of Adminiſtrations may be drawn in queſtion by Averment, that he, who granted them was a meer lay perſon, and ſo make ſuch Garboils in the Common-wealth, which is not to be ſuffered for the inconveniency which will happen by it; and therfore our Law which is founded upon reaſon ſhall judge of it according to the open appearance of the Officer, to wit, that he hath a grant made to him, and not according to the private capacity of the perſon, and this is not altered by the ſaid Statute which is made in affirmation of it, and makes the authority of a Doctor of Law abſolute, not to be defeated by the Civill or Canon Law, which is not in the other caſe: But yet it doth not make this caſe of worſe condition then it was at Common Law. And by all the pleading of the Adminiſtration committed to the Defendant, is not good, becauſe it appeareth by the date of it, that it was made after the day of the laſt continuance, and therfore could not have been pleaded untill a new continuance after: And by the Doctor the laſt Adminiſtration does not avoid the firſt, but in caſe where there is an eſpecial revocation of the firſt: But they did not ſpeak of the doubleneſſe becauſe the Demurrer was generall and not ſpeciall, and alſo becauſe the other matters were ſo cleer.

Property.

2. IN Treſpaſſe for carrying away certain Loads of Hay, the caſe hapned to be this; The Plaintiff pretending Title to certain Hay which the Defend. had ſtanding in certain Land, to be more ſure to have the Action paſſe for him, took other Hay of his own (to wit, the Plaintiff) and mixed it with the Defendants Hay, after which the Defendant took and carried away both the one and the other that was intermixed, upon which the Action was brought, and by all the Court cleerly the Defendant ſhall not be guilty for any part of the Hay, for by the intermixture (which was his own act) the Defendant ſhall not be prejudiced as the caſe is, in taking the Hay. And now the Plaintiff cannot ſay which part of the Hay is his, becauſe the one cannot be known from the other, and therfore the whole ſhall go to him who hath the property in it with which it is intermixed, as if a man take my Garment and Embroider it with Silk, or Gold, or the like, I may take back my Garment, But if I take the Silk from you, and with this, face or embroider my Garment, you ſhall not take my Garment for your Silk which is in it, but are put to the Action for taking of the Silk from you.

So here, if the Plaintiff had taken the Defendants Hay and carried it to his houſe, or otherwiſe, and there intermixed it with the Plaintiffs Hay, there the Defendant cannot take back his Hay, but is put to his Action againſt the Plaintiff for taking his Hay. The difference appeareth, and at the ſame day at Serjeants Inne in Fleetſtreet, the difference was agreed by Anderſon, Periam, and other Juſtices there, and this caſe was put by Anderſon: If a Goldſmith be melting of Gold in a Pot, and as he is melting it, I will caſt Gold of mine into the Pot, which is melted together with the other Gold, I have no remedy for my Gold, but have loſt it.

Bullock *verſus* Dibler.

3. IN an Ejectione firmæ between Edward Bullock Plaintiff, and John Dibler Defendant, the caſe appeared to be this; A man was ſeiſed of a Copyhold Tenement, parcell of the Mannor of Stratfield Mortimer, the County of Berks, in right of his wife, in his Demeſne as of Fee, and ſurrendred this Copy-hold Tenement by himſelf without his wife, to the uſe of a ſtranger in Fee, who was admitted by the Lord accordingly, the Husband dies, the wife

dies

dies, the Heir of the wife without any admittance enters upon the ſtranger, and makes a Leaſe for a year to the Plaintiff, upon whom the Defendant in right of him to whom the Surrender was made, re-enters, and adjudged that the Plaintiff ought to recover, and that the ſurrender of the Husband was not as a diſcontinuance againſt the wife, to put the Heir to his Plaint in nature of a Sur Cui in vita, for a Diſcontinuance ſhall not be by a Deed of Feoment only, but by it with the Livery enſuing, wherby the entire Fee-ſimple is given, what Eſtate ſo ever the Feoffor had by reaſon of the Livery, where by Deed of Grant nothing paſſed but that which the party might lawfully grant: And here it ſhall be taken as if the Grant had been made by the Husband which paſſed but his Eſtate, to wit, that which he might lawfully grant without prejudice to his wife. But yet there is this diverſity between a ſurrender of an Eſtate for life, and a ſurrender of an Eſtate in Fee to the uſe of a ſtranger, to wit, that by the one the Eſtate drowned in the Lord by the ſurrender, and by the other it is not drowned in the Lord, but is tranſferred to him to whom it was made, upon which he is admitted to it; otherwiſe, in the laſt caſe it returns to him who ſurrendred, and then upon the admittance he is in the Per by him who ſurrendred, and not by the Lord, or by the Surrender made by Tenant for life, he to whoſe uſe it is made ought to take it of the Lord, and he is there in by him, and not by him who ſurrendred.

And this is the common difference betwixt Cuſtomary Eſtates for lives, and Cuſtomary Eſtates of Inheritance.

And the Plaint of Cui in vita is given where recovery by default is againſt the husband and wife, and not upon the ſurrender of the husband; for ſuppoſe the husband had ſurrendred meerly to the Lord himſelf, yet the wife might have entred after the death of the husband, becauſe the ſurrender goes but to the Eſtate which the husband might lawfully part with, and therfore rather to be reſembled to a Grant then to a Feoffment.

And notwithſtanding that he was not admitted, yet he might enter and take the profits, and make a Leaſe according to the cuſtom, or bring an Action of Treſpaſſe againſt him who diſturbes him? But if the Lord require his Fine or his Services, and the Heir refuſe to do them, this may be a forfeiture of his Copyhold; But untill lawfull Seiſin made by the Lord (becauſe it belongeth to him) the Heir may intermeddle with the Poſſeſſion, albeit he be not admitted by the Lord where it is an Eſtate of Inheritance by the Cuſtom.

And in this Term alſo in another caſe, in the ſame Court it was adjudged. that an Infant who ſurrenders his Copyhold Land within age, may enter at his full age, without being put any Suit for it.

And the firſt caſe was very well argued by one Brock, a Puny utter Bariſter of the Inner-Temple, this Term for the Plaintiff. And it was the firſt Demur that he argued in Court.

Forth *verſus* Holborough.

4. IN an Action of Debt upon an Obligation of 200. marks brought by Robert Forth Doctor of Law, and Mary his Wife, as Executrix to Doctor Drewry, againſt Richard Holborough, the Caſe upon Demurrer appeared to be this; to wit, That the ſaid Dr. Drewry was ſeiſed in his Demeſne as of Fee, of the Suit of the Manor of Goldingham Hall in the County of Eſſex, and ſo ſeiſed the laſt day of Novemb. 27 Eliz. demiſed it to the ſaid Richard Holborough for 17. years from the ſaid laſt day of Novemb. wherby the Defendant entred into it the next day, and was therof poſſeſſed accordingly, and ſo poſſeſſed the laſt day of Novemb. 28 Eliz. entred into an Obligation to the ſaid Dr. Drewry, with condition, that if he, his Heirs, Executors, Adminiſtrators

ſtrators and Aſſignes, or any of them ſhould well and truly pay or cauſe to be paid to Dorothy Goldingham widow, or her Aſſigns, at the Mannor-houſe of Goldingham Hall in the County of Eſſex, for the Term of 17. years, from the Feaſt of S. Michael the Arch-angel then laſt paſt, or an Annuity or annuall Rent of 20. marks of lawfull Engliſh money, at the Feaſt of the Annunciation of our Lady, and S. Michael the Arch-angel, by equall portions, if the ſaid Dorothy ſhall ſo long live, and the ſaid Richard Holborough, or his Aſſigns, or any other claiming by, or under the ſaid Richard, or his Aſſigns, ſhal or may ſo long occupy or enjoy the ſaid Scite of the Mannor of Goldingham Hall, that then the Obligation ſhall be void; after which untill the 9th. day of May, 29 Eliz. the Defendant enjoyed the ſaid Scite, and paid duly the ſaid Annuity, and then he ſurrendred his Eſtate in the ſaid Scite to the ſaid Dr. Drewry, and after this did not pay the Annuity over, and yet continued the poſſeſſion of the ſaid Scite.

And by all the Juſtices the Defendant notwithſtanding the Surrender made to the Obligee himſelf, ought to have continued the payment of the Annuity to the ſaid Dorothy, for albeit the Term be drowned, and merged in the Reverſion, and ſo hath no continuance as to him in the Reverſion, yet as to any thing heretofore done by the Defendant who was the Termor in Judgment of Law, it is to be ſaid to have continuance: As if he had granted a Rent-charge out of it to have continuance during the ſaid Term, although he ſurrender his Term to him in the Reverſion, yet the charge continues, and as to it, the Reverſion ſhall be ſaid to be in the Termor, and albeit the Obligee himſelf ſhall not take advantage of his own, or to have the advantage of the forfeiture of an Obligation there, where his own act is the cauſe of his breach.

And if it had been, that the ſaid Dorothy during the ſaid Term ſhall have the uſe of a Chamber within the Scite, without the interruption of him, or his Aſſigns, there, if after the Surrender, the ſaid Dorothy Drewry had interrupted him of the uſe of the ſaid Chamber, the forfeiture of the Obligation ſhall not be taken againſt the Defendant for it.

But here the Condition is of a collaterall thing to be done, to wit, the payment of the Annuity to a ſtranger, with which the Land is not bound, and therfore the breach comes meerly in default of the Obligor, and of the Obligee in no part, to wit, and therfore the Obligation here is forfeited.

And by Popham, the caſe here is more cleer upon conſideration of the words of the Condition, for the words are, If the Defendant ſhall, or may enjoy, &c. and this word (may enjoy) ſhall be alwaies intended reaſonably, to wit, if it may without any thing to be done by him to the contrary; and here if he had not made the Surrender, he might have enjoyed the Scite untill the end of his Term, and therfore becauſe it cometh of his own act, whereby he, or his Aſſigns ſhall not enjoy it for the Term, if it ſhall be ſaid, that he in the Reverſion ſhall not be ſaid in, by the Termor of which he himſelf ſhall not take any advantage, in as much as if this had not been, he might have enjoyed for the whole Term. To which all the other Juſtices alſo agreed, and upon this Judgment was given for the Plaintiff.

But if any had defeated the ſaid Term by a lawfull entry, by a Title Paramount, the Obligation had not been forfeited for any default of payment after this Entry, but if Rent had been reſerved upon the Leaſe, and for default of payment, a Re-entry had been made, yet by Popham the payment ought to be continued upon the perill of the forfeiture of the Obligation, for the words (may enjoy) in as much as there it is the meer default of the Defendant himſelf, there the Leaſe does not continue, of which he ſhall not take advantage to ſave his Obligation. But note the form of the Demurrer, and that it might have been been better ioyned, which is to be ſeen in the Record where it is entred.

Eaſter

Eaſter Term 36 *Eliz.*

Geilles *verſus* Rigeway.

IN debt for 306. 16. s. 8 d. by William Geillies, againſt Thomas Rigeway Eſq; late Sheriff of Devon; For that wheras John Chaunder alias Chaundeler, was in execution with the ſaid Sheriff for the ſaid ſumm, the ſaid Sheriff afterwards, to wit, the tenth day of December, 34 Eliz. at London, in ſuch a Pariſh and Ward ſuffered him to eſcape, the ſaid Rigeway then being Sheriff of Devon, and having him then in execution, &c. To which the Defendant pleaded, how that he took him in Execution by the Proces at Stockram in the County of Devon, as the Plaintiff hath alledged, and there detained him in ſafe cuſtody untill the 8th. day of December, 34 Eliz. at which day the ſaid Chaundeler broke the Priſon, and eſcaped out of it contrary to the will of the ſaid Defendant, and that the Defendant did freſhly purſue him, and in this freſh purſuit did re-take him the 11th. day of December, then next enſuing at Stockram aforeſaid, and detained him in execution for the ſaid 306 l. 6 s. 8 d. during the time of his Office, and delivered him over to the new Sheriff, &c. To which the Plaintiff replyed by proteſtation, that he did not make freſh purſuit; And for plea ſaith, That after the going away of the ſaid Chaundeler, and before his re-taking by the ſaid Defendant as aforeſaid, the ſaid Chaundeler for a whole day and night, to wit, at London, in the Pariſh and Ward aforeſaid, was out of the view of the ſaid Defendant, &c. Upon which it was demurred in Law.

And it was moved by Cook Attorney-generall, that Judgment ought to be given for the Plaintiff; for, in as much as it was alledged, that he was out of the view of the Sheriff for a day and a night together, there it ſhall be intended to be a default in the Defendant in the making of his purſuit, and therfore chargable to the Plaintiff, and yet he agreed, that if the Sheriff had made his purſuit freſhly; although that at the turning of a Lane, end of a houſe, or the like, the Priſoner had been out of the view of the Sheriff for a ſmall time, as untill the Sheriff commeth to this turning, end of the houſe, or the like, yet the Sheriff may re-take the Priſoner, and he ſhall be yet ſaid to be in execution to the party againſt his will, yet when he is for ſo long a time out of his view, it ſhall be otherwiſe, for the default which the Law preſumes to be in him; and therfore in this caſe the action lies. To which it was anſwered by Popham, Gawdy, and Clench, That if he makes freſh purſuit, ſo that it doth not appear fully that there was a default in the Sheriff in his purſuit, although he were ſo long out of his view, yet he ſhall be ſaid to be in execution for the party againſt his will upon the retaking of him: As if he be purſued to a houſe where he is kept for a long time, and the Sheriff ſet a guard upon the houſe, and after this re-take him the next, or any other day without departing from thence, the Sheriff in ſuch a caſe may re-take him upon his coming out of the houſe, and he ſhall be in execution to the party againſt his own will.

And ſo in all like Caſes; As if he purſues him in the night, ſo as he cannot ſee him, and yet by the tract of the horſe, or enquiry he makes diligent purſuit to re-take him, ſo that it cannot appear that there was any negligence or default in him in making purſuit.

And it is not the form of the pleading to alledge, that he purſued him freſhly, and had him alwaies in his view untill he re-took him, but only that he purſued him freſhly and took him in this freſh purſuit, without ſaying any thing that he was in his view, and therfore his being out of the view of the Sheriff is not materiall in the caſe, but the freſh purſuit, and the taking of him in this purſuit.

Then Coke moved, that the Bar was not good, because he doth not shew where he made the pursuit, so that he might agree to answer that which is alledged by the Plaintiff, to wit, his being at large at London, and therfore the Bar not being good, Judgment shall be given against the Defendant for the insufficiency of his Bar: for a Repleader shall not be in case of Demurs, as it hath been adjudged here very lately, and also in the Common Bench.

To which it was answered by the said Justices, That if the Bar be insufficient in matter, so that it may appear by it, that the Plaintiff hath sufficient cause of Action, which in matter is not sufficiently avoided by the Bar, Judgment shall be given for the Plaintiff upon the Bar, if the Replication be sufficient, and no Repleader; but if the Bar be sufficient for the matter and insufficient for the form only, as it is here, there before the Statute of Eliz. for pleading there shall be a Repleader, but now because no Demurrer was upon the Bar, but a Replication made to it, therfore by Popham no advantage shall be taken of the Bar for matter of form, which is admitted by the party, and no advantage taken therof according to the Statute.

And they all agreed, that the Sheriff, albeit he did not make fresh pursuit upon the escape, may yet take, re-take the Prisoner who escaped from him out of Execution, for the Prisoner shall not take advantage to avoid the Execution; and therfore in respect of the Plaintiff, who yet may accept the Prisoner to be in execution, the Sheriff may re-take the Prisoner. But if the Plai. had recovered against the Sheriff before for the escape, then the Sheriff for his Indempnity cannot re-take him, but is put to his Action upon the Case against the Prisoner, for the Sheriff hath no colour in such a case of escape to retake him, but in respect, and for the advantage of the Plaintiff, who had Judgment against the Prisoner, and not in respect of the private wrong done to himself, of which he hath no Judgment, and as it is now, the Replication not being good (by Popham) Judgment ought to be given against the Plaintiff. But by assent it was ordered that the Defendant shall put in new Bail, and that upon it, he shall plead anew; But how shall it be if the Sheriff do not make fresh Suit and re-take him? And afterwards he, at whose Suit he was in Execution recovered against the Sheriff; may the Prisoner have an Audita querela upon the matter?

Upon an Assembly of all the Justices at Serjeants-Inn in Fleetstreet, with the Barons of the Exchequer, it was clearly agreed by them all (but two, who at the beginning made some doubt of it, but at the end assented also.)

Burglary.

If in the night, the house of any be broken, with an intent to steal any thing being in the house, although no person be in the house at this time, yet this is Burglary, for the Law is, that every one shall be in security in the night, as well for their Goods as their persons which be in the house.

And if a Church be broken in the night for the stealing of any thing in it, this is Burglary, though no person be in it at this time. And so hath the Law alwaies been put in execution, and in all the Books which speak of Burglary, it is not mentioned that any person ought to be in the house, but that it is Burglary, the Messuage being broken in the night, to the intent to kill any person there, or to the intent to steal any thing out of it.

And the case that of late time it hath been put in the Indictements of Burglary, that some person was then there, &c. hath been, because that in such cases of Burglary, Clergy was taken away, but now by the Statute of 18 Eliz. Clergy is taken away in every case of Burglary.

And the ancient Presidents are, Quod domum of such a one Noctanter Felonice & burglariter fregit, without making mention that any person was then in it, or making mention that it was Domus mansionalis of any: And it may be a Mansion House, albeit no person then inhabit in it. And agreed that

that hereafter it ſhall be ſo put in execution by all the Juſtices. See this more fully hereafter, Trin. 36 Eliz. Pl. 1. in this Book.

AT Tres Paſchæ this Term there were made four Serjeants at Law; viz. Lewkenor, Savage and Williams of the Middle-Temple, Heale only of the Inner-Temple, Kingſmill, Warburton, Branthwaite, and Flemming of Lincolns-Inn, and Daniel and Spurling of Grayes-Inn.

And all the Juſtices were aſſembled in the Middle-Temple-Hall, the Wedneſday paſt Meſem Paſchæ, being the ſecond day of May, where the two chief Juſtices, and chief Baron ſate upon the Upper-Bench of the ſame Hall, in their Scarlet Robes with their Collers of S. S. and every one of the other Juſtices and Barons in their Ancienty, one on the one ſide, and the other on the other ſide in their Scarlet Robes alſo, and then came the new Serjeants in their black Gowns before the Juſtices there, the two eldeſt being put in the midſt before the chief Juſtice of England, and ſo every one of them, one on the one ſide, and the other on the other ſide, according to their Ancienty, and every one of the ſaid Serjeants having one of his Servants behind him at his back, with his Maſters Scarlet Hood and Coife upon his arms: And therupon the ſaid chief Juſtice made his Speech in this manner.

IF men will enter into a due conſideration upon what grounds the Laws of this Realm have their Original Foundation, and what good effects are wrought through the due execution of the ſame they might ſay, and that juſtly, that the profeſſion therof is both an honeſt, and honourable Profeſſion.

The Laws are derived partly from the law of God and partly from the Law of Nature. From the Law of God, in that it ordaineth means how the people may be truly inſtructed in the knowledge and fear of God: How they ſhould demean themſelves towards their Soveraign and Prince: How they ought to live one with the other, and how to be defended from oppreſſions and injuries. From the Law of Nature, in that it provideth how each man may defend himſelf, that he may live by his own labours, or otherwiſe according to his profeſſion or calling; That he may ſecure his Poſterity of that which he hath gathered together by his induſtry, and that man with man may live together in ſuch ſecure and comfortable Society as appertaineth. And what be the effects which grow by the due execution of the Laws? They are theſe.

By it, God is known, the Soveraign Prince obeyed, the people are kept to live in peace, and that is yeilded to each which is his due: And can there be any better things then theſe upon the face of the Earth? No, there cannot. The Law therfore being taken from ſo good a ground, and working ſuch notable and honourable effects, who can juſtly ſay otherwiſe, but that the profeſſion of ſuch a Law is an honourable profeſſion? Are not the Judges of the Law profeſſors of the Law? See then what God himſelf in his word hath ſaid of Judges in *Pſal.* 82. ſpeaking of Judgment and Juſtices he ſaith thus; *I have ſaid yee are Gods*, and can there be any higher name then this in Heaven or Earth? And why are they ſo learned? but for that, they in their Offices do reſemble that which is the Office of God, as to diſcern ſo far forth as mans capacity can reach unto between right and wrong, truth and falſhood, the juſt and the unjuſt, which is a moſt high, weighty and honourable charge, and therfore 2 *Chron.* 19 6. *cha. Jehoſophat* ſaid to the Judges, *Take heed what you do, for you do not execute the Judgments of men, but of the Lord, and He will be with you in Judgment.* By which it is evident, that they are either groſly ignorant, or otherwiſe very malignant and contemptuous perſons that may not be induced to be reformed, that do in any wiſe hold the profeſſion to be either baſe or contemptible.

And

And this I may truly ſay to the encouragement and comfort of ſuch as being honeſt do profeſs the Law: That in the moſt parts of *England* there are more Gentlemens houſes, and thoſe of continuance raiſed and advanced by that profeſſion alone, then by all other the profeſſions that can be ſpoken of, and approved,.

Let any man of Experience in the State, of the generall part of the Realm enter into a due conſideration of it, and I am well aſſured he ſhall find it ſo; wherby it may plainly appear, that Gods bleſſings for worldly benefits have greatly abounded towards ſuch as have walked evenly and juſtly in that calling: yet happily there may be ſome (I mean ſuch as ſlip in by extraordinary means) that ſomtime do give ſcandall to the Profeſſion; as where ſuch are called to the Degrees of Learning, as are either ignorant, or infamous perſons, wherby they either cannot adviſe as they ſhould, or by giving themſelves over to ſlights and to ſhifts, they do not adviſe as they ought.

A matter abhorred of all good and honeſt men: But the ſame being duly weighed, tendeth to the touch of the perſon, and not of the Profeſſion. Nevertheleſs to avoid this Scandall, I would adviſe;

1. Such as have Government in theſe houſes of Court, ſhould be very carefull and reſpective in their Calls, not only to the bench as Readers, but of thoſe alſo whom they call to the Bar, that they may be ſuch as may appear to be both learned, and honeſt, and ſuch as may not juſtly be impeached of Ignorance, or Ignominy; for ſuch are not only to adviſe between parties, but many of them are drawn to Credit and Government alſo in their Countries, and therfore behoofull to be free from ſuch Imputations.

And ſithence without the knowledge of the Law in ſome meaſure, ſuch as govern in their Countries, may often fall to commit ſuch Errors as were to be wiſhed might be otherwiſe.

It were convenient that Gentlemen, yea, thoſe of beſt worth would bring up their very heirs in the knowledge of the Laws, as that they might in after ages, when as they ſhall be called to Government, be ſo able to govern under her Majeſty as might beſt ſtand with their Reputations, and the good of their Countries.

And now your ſelves that are here preſent, and have been called to this State and Degree of Serjeants at Law (a State and Degree I may well call it, for that her Majeſty doth ſo term it) Since your gravities and your good converſations in your callings hither-to, and the good opinion conceived of your Learnings, Experiences, and Diſcretions hath moved her Majeſty to call you to this Dignity,

I am now to adviſe you ſo to demean and govern your ſelves in your Profeſſion as thoſe good things thus conceived of you may not henceforth any waies be blemiſhed, but rather encreaſe, to your further Reputations and Credits. In which you are to have a ſpeciall regard that you be thankfull, firſt, to God, who hath ſo guided the courſe of your lives hither-to, as it hath made you to have been thought to have merited this Advancement. Then to her Majeſty, who upon good report made, hath conceived ſo well of you as to call you to this Degree, wherin it behoveth you ſo to demean your ſelves, as in all her Highneſs Service, both in your Countries and otherwiſe, as you ſhall be called therunto, as you may be found to deal therin effectually, diligently, and juſtly.

And laſtly, to the Country and Common-wealth who hath carried ſo good a report of you, as therby you have been the rather brought to this place: And the moſt thankfulneſs you can ſhew to your Country, is, to Councell your Clients according to your skill honeſtly, and truly, wherby they may not be encouraged to ſpend their time and their ſubſtance in vain, frivolous, and unjuſt Suits; to be faithfull and ſecret to your Clients, not diſcloſing their Councels to their prejudice, that you expedite your Clients Cauſe

ſo

ſo far forth with conveniency, and your Clients ſafety, that both in your practice and otherwiſe, your ſpeech and behaviour towards all men be modeſt and diſcreet, yea, ſuch as appertaineth to men of your Gravities and Callings, that without reſpect of perſons, yea, be bold to maintain your Clients honeſt Cauſe, ſo far forth as may ſtand with knowledge and diſcretion: And that in all things you reſpect more your honeſties, then your profits.

And touching theſe points, you have a continuall memory, and that alwaies about you, in your very Garments: And therfore by the Coif, in reſpect it is white many things are ſignified, as Gravity, Wiſdom, and Experience, for that theſe Virtues are proper to the gray haires, and white headed men.

There is alſo ſignified therby, that you ſhould be both honeſt and of an unſpotted life; And in that it is faſhioned like a Helmet, it ſignifieth, that you ſhould be both bold to utter your knowledge in the Law, in the honeſt and juſt cauſe of your Client, without reſpect of perſons whomſoever it concerneth. And by the party-colour'd Garments, being both of deep colours, and ſuch as the Judges themſelves in ancient time uſed (for ſo we receive it by tradition) is ſignified ſoundneſs and depth of judgment and ability to diſcerne of Cauſes, what colour ſoever be caſt over it, and under, or with what vail or ſhadow ſoever it be diſguiſed. For the wholneſs and cloſneſs of your Garments, they do ſignifie integrity to be uſed in your advices, and ſecrecy in your councels. And in that the Garments being ſingle and unlined, it betokeneth that you ſhould be ſincere and plain in your adviſes, and not double, carrying your opinion to your ſelf one way, and you adviſe it your Client clean another way.

The two Tongues do ſignifie, that as you ſhould have one Tongue for the Rich for your Fee, as a reward for your long ſtudies and labours, ſo ſhould you alſo have another Tongue as ready without reward to defend the Poor and Oppreſſed; And therin to ſhew your ſelves thankfull to God for all that which he hath beſtowed upon you.

And for the Rings you give, as Gold is amongſt all Mettals the pureſt, ſo ſhould you be of all others of your Profeſſion the perfecteſt both in knowledge and in the other Virtues before remembred: And in that it is a Ring, and round without end, it betokeneth that you have made a perpetuall Vow to this your Profeſſion and Calling, and are as it were wedded unto it: And therfore I heartily wiſh you may alwaies walk therin according as appertaineth to your Calling.

And this done, the ancienſt Serjeant beginneth to recite his pleading, and ſo each after other in order.

And that done, the ancienteſt kneeleth down before the chief Juſtice of England, and ſo the reſt before the Juſtices and Barons as they are in ancienty, and had ſeverally by the ſaid chief Juſtice their Coifs put upon their heads, and then their red Hoods upon their ſhoulders, and then the Serjeants return to their Chambers, and put on their party colourd Garments, and ſo walk on to Weſtminſter the one after the other, as they be in ancienty, bare-headed, with all their Coifs on, and ſo are in their turn preſented the one after the other, by two of the ancienteſt Serjeants: And after their pleadings recited, they give their Rings in the Court by ſome friends, and ſo are therupon ſet in their place at the Bar according to their ancienty.

And all this done, they return to their Chambers, and there put on their black Gowns, and red Hoods, and come into the Hall each ſtanding at his Table according to his ancienty bare-headed, with his Coif on, and after ſetteth himſelf upon the Bench, having a whole meſs of meat, with two courſes of many Diſhes ſerved unto him; And in the afternoon they put on their Purple Gowns, and then go in order to Pauls, where it hath been accuſtomed that they heard Service, and had a Sermon.

Edwards *verſus* Halinder.

4. IN an Action upon the Caſe by Rice Edwards againſt Edward Halinder; The Plaintiff declared by his Bill that one Edward Baniſter was ſeiſed in his Demeſne as of Fee, of a Meſſuage in ſuch a Pariſh and Ward in London, and being ſo ſeiſed did let to him the Cellar of the ſame houſe the 23. day of April, 32 Eliz. for a week, from the ſame day, and ſo from week to week, ſo long as the parties ſhould pleaſe, at ſuch a Rent by the week, wherby he was poſſeſſed.

And further, that the ſaid Edward Baniſter being ſeiſed of the ſaid houſe, as is aforeſaid, afterwards, to wit, 29. July, in the 32. year aforeſaid, gave to the ſaid Defendant Officium, Anglice, the Warehouſe of the ſaid Meſſuage being right over the ſaid Cellar, for a week from thenceforth, and ſo from week to week, ſo long as the parties ſhould pleaſe, paying ſuch a Rent, wherby the Defendant was therof poſſeſſed accordingly: And the Plaintiff being poſſeſſed of the ſaid Cellar, and the Defendant of the Warehouſe, as aforeſaid, and the Plaintiff then having in the ſaid Cellar three Butts of Sack to the value of 40 l. &c. The Defendant the 30. day of July in the 32. year aforeſaid, put ſuch a quantity of weight and burthen of Merchandize into the ſaid Warehouſe, and therby did ſo overburthen the floor of the ſaid Warehouſe, ſo that by the force and weight of the ſaid burthen, the ſaid floor the ſaid 30. day of July was broken, and by force therof did fall, and that therby the Merchandize that were in the ſaid Warehouſe did fall out of the ſaid Warehouſe into the ſaid Cellar upon the ſaid Veſſels of Wine, and by force therof brake the ſaid Veſſels of Wine, wherby the ſaid Wine did ſlye out of the ſaid Veſſels, and became of no value, to the Plaintiffs damage of a hundred pound, &c. To which the Defendant ſaith, That within a ſmall time before the Treſpaſſe committed, the floor of the ſaid Warehouſe ſuſtained as great a burthen of Merchandize as this was: And that the Warehouſe was demiſed to him as the Plaintiff hath alledged to lay in it 30. Tun weight, wherby he was poſſeſſed, and ſo poſſeſſed the ſaid 30. day of *July*, did put into the ſaid Warehouſe but 14. Tun weight of Merchandize, and that the damages which the Plaintiff had by the breaking of the floor, was, becauſe the floor at the time of the laying of the merchandiſe upon it, & alſo before the leaſe made to him therof was ſo rotten, and a great part of the Wall upon which the ſaid floor lyes, ſo much decayed, that for default of Reparations and ſupporting therof by thoſe to whom the reparations did belong, before the Leaſe therof made, it ſuddainly brake, which matter he is ready to aver; Wherupon the Plaintiff demurred, and Judgment was given for the Plaintiff in the Exchequer, upon which a Writ of Error was brought in the Exchequer Chamber, and the Error aſſigned was, that the Judgment ought to have been given for the Defendant, becauſe that now it appeareth that there was not any default in the Defendant, for he was not to repair that which was ſo ruinous at the time of his Leaſe, and therfore if it did bear ſo much lately before, it cannot fall by the default of the Defendant in the weight put upon it, but by the ruinouſnes of the thing demiſed; And yet by the advice of the Juſtices the Judgment this Term affirmed: for the Plaintiff hath alledged expreſly, that the floor brake by the weight of the Merchandize put upon it, which ought to be confeſſed and avoided, or traverſed; whereas here he anſwers but argumentatively, to wit, that it did bear more before, therfore that he did not break it by this weight, or that it was ſo ruinous that it brake, Ergo not by the weight: whereas here it is expreſly alledged, that it brake by the weight put upon it, and if leſſer weight had been put it would not have broken. And he who takes ſuch a ruinous houſe ought to mind well what weight he put into it at his perill, ſo that it be not ſo much that another ſhall take

take any damage by it: But if it had fallen of it ſelf without any weight put upon it, or that it had fallen by the default only of the poſts in the Cellar which ſupport the floor, with which the Defendant had nothing to do, there the Defendant ſhall be excuſed? But here it is expreſly alledged, that it fell by the weight put upon it, which ought to be anſwered: As if a man take an Eſtate for life, or years in a ruinous houſe, if he pull it down he ſhall be charged in Waſt, but if it fall of it ſelf, he ſhall be excuſed in Waſt; ſo there is a diverſity where default is in the party, and where not, ſo here, the Defendant ought to have taken good care, that he did not put upon ſuch a ruinous floor more then it might well bear, & if it would not bear any thing, he ought not to put any thing into it, to the prejudice of a third perſon, and if he does, he ſhall anſwer to the party his damages.

Collard *verſus* Collard.

5. IN an Ejectione firmæ brought by Conſtantine Collard againſt Richard Collard, the caſe appeared to be this; Thomas Collard was ſeiſed in his Demeſne as of Fee, of Lands in Winkle in the County of Devon, called the Barton of Southcote: And having two Sons, to wit, Euſtace the eldeſt, and Richard (the now Defendant) the youngeſt, and the eldeſt being to be married, the ſaid Thomas in conſideration of this marriage, being upon the ſaid Barton ſaid theſe words.

Euſtace ſtand forth, I do here, reſerving an Eſtate for my own life and my wives life, give unto thee and thy Heirs for ever theſe my Lands, and Barton of Southcote; after which the ſaid Thomas enfeoffed his youngeſt Son of Barton, with warranty from him and his Heirs, the eldeſt Son enter, and let it to the Plaintiff, upon whom the Defendant re-enter, upon which re-entry the Action was brought, and upon a ſpeciall Verdict all this matter appeared: But it was not found by the Verdict, that the ſaid Thomas Collard the Father was dead, and therefore the Warranty was not any thing in the Caſe. And it was moved by Heale that the Plaintiff ought to be barred, becauſe it did not paſſe by way of Eſtate, in as much as a man cannot paſſe a Freehold of a Land from himſelf to begin at a time to come, and by it to create a particular Eſtate to himſelf, and in uſe it cannot paſſe, becauſe that by a bare parole an Uſe cannot be raiſed, and by giving my Land to my Son, Coſin, and the like, nothing will paſſe without Livery, for there is not conſideration to raiſe an Uſe.

Fennor, The words ſhall be taken, as if he had ſaid (here I give you this Barton reſerving an Eſtate for my life) although the words of reſervation have priority in their time from the ſpeaking of them, becauſe a reſervation cannot be but out of a thing granted, and therefore the reſervation ſhall be utterly void, or otherwiſe ought to be taken according to their proper nature, to wit, to be in their operation ſubſequent, and ſo ſhall not hurt the Grant, and therefore are not to be compared to the caſe where a man grant that after the death of I.S. or after his own death a ſtranger ſhall have his Land, which Popham granted.

And Fennor ſaid further, that theſe words being ſpoken upon the Land, as before amount to a Livery.

Gawdy ſaid, That the words as they are ſpoken amount to a Livery, if the words are ſufficient to paſſe the Eſtate, but he conceived that the words are not ſufficient to make the Eſtate to paſſe to the ſaid Euſtace, becauſe his intent appeareth, that Euſtace was not to have the Land untill after the death of him and his wife, and therefore of the ſame effect, as if he had granted the Land to the ſaid Euſtace after his death; and as an Uſe it cannot paſſe, becauſe by a bare word an Uſe cannot be raiſed, as appeareth in divers Reports.

Mich.

Mich. 12,& 13 Eliz. which is a good caſe to this purpoſe: But to ſay generally that an Uſe cannot be raiſed or charged upon a perfect Contract by words upon good conſideration, cannot be Law; and therfore it is to be conſidered what the Law was before the Statute of 27 H.8. And I thinke that none will deny, but that by grant of Land for money, before this Statute an Uſe was raiſed out of the ſame Land, for a bargain and ſale of Land for money, and a grant of Land for money is all one, and no difference between them: And is not a grant of Land made in conſideration of marriage of my Son and Daughter, as valuable as a grant of it for money? It is cleer that it is, and much more valuable, as my blood is more valuable to me then my money; and therfore it is abſurd to ſay, that the conſideration of money raiſe or change an Uſe at Common Law, and not ſuch a conſideration of marriage.

And in ſuch a caſe at Common Law there was not any diverſity, that the party who ſo grant or bargain for the one or the other conſiderations was ſeiſed of the Land granted, or bargained in uſe, or poſſeſſion, but that the Uſe by the Contract was tranſferred according to the bargain in both caſes where there is a conſideration: And where through all the Law ſhall it be ſeen that of any thing which might paſſe by contract, there need any other thing then the words which make the contract, as writing or the like teſtifying it? And that the Law was ſo, it appeareth by the Statute of Inrolements of bargains and ſales of Land made 27 H.8. which enacts, that no Freehold, nor Uſe therof ſhall paſſe by bargain and ſale only, unleſſe it be by deed indented and enrolled according to the Statute; Ergo, if this Statute had not been, it had paſſed by the bargain and ſale by bare words; and in as much as the Statute enacts this in caſe of bargain and ſale only, the other caſes, as this caſe here, are as it was before at Common Law. And by an exception at the end of the ſame Statute, London is as it was at Common Law, and therfore now Lands may paſſe there at this day by bargain and ſale, by word without deed, for it is out of the Statute: And how can we ſay, that the Statute of Uſes does any thing to alter the Common Law in this point, by any intent of the makers therof, wheras at the ſame Parliament they made an eſpeciall Law in the caſe of bargain and ſale of Lands. And at this day, for the Lands in London, notwithſtanding the Statute of Uſes, the Law hath been put in practice, and alwaies holden as to the Lands there to be good, if ſold by bare Parole as it were at Common Law. And I have heard it reported by Manwood late chief Baron of the Exchequer, that it was in queſtion in the time of King Edw. the 6th. whether the uſe of a Freehold of Land will paſſe upon a Contract by Parole without Deed in conſideration of marriage; upon which all the then Juſtices were aſſembled upon a doubt riſing in a caſe, hapning in the Star-chamber, and then reſolved by all the Juſtices (as he ſaid) that it ſhall paſſe; and he ſaid, that himſelf was of this opinion alſo: And to ſay, that by grant of Land at Common Law, the uſe had been raiſed out of the poſſeſſions of the Land which the Grantor then had, and by it paſſe to the Burgaines, and that it ſhall not be raiſed and paſſed to another by grant of Land in conſideration of marriage, which is a more valuable conſideration then money, is abſurd and againſt all reaſon.

And for the ſolemnity, Uſes in ſuch caſes (in reſpect of marriage) were the cauſe that they alwaies were left as they were at Common Law, and not reſtrained as the caſe of bargain and ſale is, which by Common intendment may be made more eaſily and ſecretly, then that which is done in conſideration of marriage, which is alwaies a thing publike and notorious, but it is not reaſonable that every ſlight or accidentall ſpeech ſhall make an alteration of any Uſe: As if a man aſk of any one what he will give or leave to any of his Sons or Daughters for their advancement in marriage, or otherwiſe for their advancement, this ſhall be but as a bare ſpeech or communication,

cation which ſhall not alter or change any Uſe: But where there is upon the Speech a concluſion of a Marriage between the friends of the parties themſelves, and that in conſideration therof, they ſhall have ſuch Lands, and for ſuch an Eſtate, there the Uſe ſhall be raiſed by it, and ſhall paſſe accordingly to the parties, according to the concluſion which Fennor granted.

But by Popham, If it may be taken upon the words ſpoken, that the purpoſe was to have the Eſtate paſſe by way of making of an Eſtate, as by way of Feoffment, &c. then notwithſtanding the conſideration expreſſed, the uſe ſhall not change, nor no Eſtate by it but at will, untill the Livery made therupon: And therfore if a man make a Deed of Feoffment, with expreſſe conſideration of marriage, although the Deed hath words in it of Dedi & Conceſſi, with a Letter of Attorney to make Livery therupon, there untill Livery made nothing paſſe but at will, becauſe that by the Warrant of Attorney, it appeareth the full intent of the parties was, that it ſhall paſſe by way of Feoffment, and not otherwiſe, if it be of Land in poſſeſſion: And if it be of Land in Leaſe, not untill Attornment of Tenants, which was granted by all the Juſtices.

But if a man in conſideration of money makes a Deed of Gift, Grant, Bargain, and Sale of his Lands to another, and his Heirs by Deed indented, with a Letter of Attorny to make Livery, if Livery be therupon made before Inrolement, there it hath been adjudged to paſſe by the Livery, and not by the Inrolement.

But by Popham, where Land is to paſſe in poſſeſſion by Eſtate executed, two things are requiſite: The one, the grant of the ſaid Land, the other, the Livery to be made therupon, for by the bare Grant without Livery, it doth not paſſe as by way of making of an Eſtate: And this is the cauſe that ſuch ſolemnity hath been uſed in Liveries, to wit, if it were of a Meſſuage, to have the people out of it, and then to give Seiſin to the party by the Ring of the door of the Houſe, and of Land by a Turff and a Twig, and the like, which may be notorious: Yet I agree it ſhall be a good Livery to ſay to the party, Here is the Land, enter into it, and take it to you and your Heirs for ever, or for life, or in tail, as the caſe is; And albeit Livery by the View may be made in ſuch manner, yet by the ſealing of the Deed of Grant upon the Land, or by grant of it upon the Land without Livery, nothing paſſe but at will. But if therupon one party ſaith to the other after the Grant, or upon it, Here is the Land, enter upon it, and take it according to the Grant, this is a good Livery: But he ought to ſay this, or ſomthing which amounts to ſo much, or otherwiſe it ſhall not paſſe by the bare Grant of the Land, although it be made upon the Land. Clench ſaid, That when Thomas ſaid to Euſtace, Stand forth, here I do give to thee and thine Heirs theſe Lands, this amounts to a Grant and a Livery alſo; and by the words of the Reſervation of the Eſtate to himſelf, and his wife for their lives, in this the Law ſhall make an uſe in the ſaid Thomas and his wife for their lives: ſo that by ſuch means it ſhal enure, as if he had reſerved the uſe therof to him and his wife, and ſo it ſhall enure to them as it may by the Law according to his intent, without doing prejudice to the Eſtate paſſed to the ſaid Euſtace: And afterwards Term Mich. 36, & 37 Eliz. the Caſe was again diſputed amongſt the Juſtices, and then Popham ſaid, That the Caſe of Bargains and Sales of Lands in Cities, as London, &c. as appeareth in Dyer 6. Eliz. are as they were at Common Law; To which all the Juſtices agreed, and therfore ſhall paſſe by Bargain by parole, without writing. And by Bayntons Caſe in 6, & 7 Eliz. it is admitted of every ſide, that an Uſe was raiſed out of a Poſſeſſion at Common Law by Bargain and Sale by parole, and otherwiſe, to what purpoſe was the Statute of Inrolements, and by the ſame caſe it is alſo admitted now to paſſe by parole upon a full agreement by words in conſideration of Marriage, or the continuance of Name, or Blood.

For it is agreed there, that the conſideration of nature is the moſt forceable conſideration which can be, and agreed alſo that a bare Covenant by writing without conſideration, will not change an Uſe, therfore the force therof is in the conſideration, of which the Law hath great reſpect: And therfore the Son and Heir apparant ex aſſenſu patris, onely may at the dore of the Church endow his wife of his Fathers Land, which he hath in Fee, and this is good by Littleton, although the Son hath nothing in it, wherby an Eſtate paſſe to the wife, which is more then an Uſe. Nature is of ſo ſtrong conſideration in the Law; And therupon after advice, Judgment was given for the Plaintiff: the Roll of this appeareth in Banco Regis, 1 Hill 35. Eliz. Rot. 355. And upon this Judgment, a Writ of Erroꝛ was brought, and the Judgment aforeſaid reverſed in the point of Judgment in the Exchequer, by the Statute of 27 Eliz.

Kettle *verſus* Maſon, *and* Eſterby.

Vide this caſe *Coke* lib. 1. 146, &c.

6. IN a ſecond deliverance between Joh. Kettle Plaintiff, and George Maſon and Francis Eſterby, Avowants, the caſe appeared to be this: Thomas May was ſeiſed of the Manor of Sawters and Hawlin, in the County of Kent, in his Demeſne as of Fee, and being ſo therof ſeiſed, enfeoffed Thomas Scot and John Fremling and their Heirs, to the uſe of Dennis May his Son and Heir apparant and his Heirs, upon condition, that the ſaid Dennis and his Heirs ſhould pay to one Petronell Martin for his life, an annuall Rent of 10 l. which the ſaid Thomas had before granted to the ſaid Petronell, to begin upon the death of the ſaid Thomas; And upon condition alſo, that the ſaid Thomas upon the payment of 10 s. by him to the ſaid Feoffees, or any of them &c. might re-enter: After which the ſaid Thomas May and Dennis, by their Deed dated 30. May, 19 Eliz. granted a Rent-charge out of the ſaid Manor of 20 l. a year to one Anne May for her life, after which the ſaid Thomas May paid the ſaid 10 s. to the ſaid Feoffees in performance of the Condition aforeſaid, and therupon re-entred into the Land and enfeoffed a ſtranger: And whether by this the Rent were defeated, was the queſtion: And it was moved by Coke Attorney-generall that it was not, but that in reſpect that he joyned in the part, it ſhall enure againſt the ſaid Thomas by way of confirmation, which ſhall bind him as well againſt this matter of Condition, as it ſhall do againſt any Right which the ſaid Thomas otherwiſe had. And therfore by Littleton, If a Diſſeiſor make a Leaſe for years, or grant a Rent-charge, and the Diſſeiſor confirm them, and afterwards re-enters; albeit Lit. there makes a Quære of it, yet Cook ſaid, That the Diſſeiſor ſhould not avoid the Charge, or Leaſe which was granted by the whole Court. And by him the opinion is in P. 11. H. 7. 21. If Tenant in Tail makes a Feoffment to his own uſe upon Condition, and afterwards is bound in a Statute, upon which Execution is ſued, and afterwards he re-enter for the Condition broken, he ſhall not avoid the Execution, no more the Rent here.

Fennor agreed with Cook, and ſaid further, That in as much as every one who hath Title and Intereſt have joyned in the Grant, it remains perpetually good.

And therfore if a Parſon at Common Law had granted a Rent-charge out of his Rectory, being confirmed by the Patron and Ordinary, it ſhall be good in perpetuity, and yet the Parſon alone could not have charged it, and the Patron and Ordinary have no Intereſt to charge it, but in as much as all who have to intermeddle therin are parties to it, or have given their aſſent to it, it ſufficeth.

Gawdy was of the ſame opinion, and ſaid, That there is no Land but by ſome means or other it might be charged, and therfore if Tenant for life grant a Rent-

a Rent-charge in Fee, and he in the Reverſion confirm the Grant, per Littleton, the Grant is good in property, ſo here.

To which Clench alſo aſſented, but Popham ſaid, That by the entry for the Condition, the Charge is defeated: And therfore we are to conſider upon the ground of Littleton in his Chapter of Confirmation, to what effect a Confirmation ſhall enure, and this is to bind the right of him who makes the Confirmation, but not to alter the nature of the Eſtate of him to whom the Confirmation is made; And therfore in the caſe of a grant of a Rent-charge by the Diſſeiſor, which is confirmed by the Demiſee: the reaſon why the Confirmation ſhall make this good, is, becauſe that as the Diſſeiſee hath right to defeat the right and the Eſtate of the Diſſeiſor by his Regreſſe, in the ſame manner hath he right therby to avoid a Charge, or a Leaſe granted by the Diſſeiſor, which Right for the time may be bound by his confirmation. But when a man hath an Eſtate upon condition, although the Feoffor, or his Heirs confirm this Eſtate, yet by this the Eſtate is not altered as to the Condition, but it alwaies remaineth, and therfore Nihil operatur by ſuch a confirmation to prejudice the Condition. And ſo there is a great diverſity, when hewho confirmeth, hath right to the Land, and where but a Condition in the Land. And by him, if a Feoffee upon condition make a Feoffment over, or a Leaſe for life or years, every one of theſe have their Eſtates ſubject to the Condition; and therfore by a Confirmation made to them, none can be excluded from the Condition: And the ſame reaſon is in caſe of a Rent granted by a Feoffor upon Condition, it is alſo ſubject to the Condition, and therfore not excluded from it by the Confirmation, as it ſhall be in caſe of a Right.

And to prove this diverſity, ſuppoſe there be Grand-father, Father, and Son, the Father diſſeiſe the Grand-father, and makes a Feoffment upon Condition, and dies, after which the Grand-father dies, now the Son confirms the Eſtate of the Feoffee, by this he hath excluded himſelf from the Right which deſcended to him by his Grand-father, but not to the Condition which deſcended to him from his Father.

And of this opinion were Anderſon and other Juſtices at Serjeants-Inn in Fleetſtreet, for the principall Caſe upon the Caſe moved there, by Popham this Term: And as the caſe is, it would have made a good queſtion upon the Statute of Fraudulent Conveyances, if the Advowry had been made as by the grant of Thomas May, in as much as the Eſtate made to the uſe of Dennis, was defeaſable at the pleaſure of the ſaid Thomas, in as much as it was made by the Tenant of the Land, as well as by him who made the Conveyance, which is to be judged fraudulent upon the Statute. But this as the pleading was, cannot come in queſtion in this caſe: And afterwards by the opinion of other three Judges, Judgment was given that the Grant ſhould bind the ſaid Thomas May, and his Feoffees after him, notwithſtanding his regreſſe made by the Condition, in as much as the Grant of the ſaid Thomas ſhall enure to the Grantee by way of confirmation.

And by Gawdy, If a Feoffee upon Condition make a Feoffment over, and the firſt Feoffor confirm the Eſtate of the laſt Feoffee, he ſhall hold the Land diſcharged of the Condition, becauſe his Feoffment was made abſolutely without any Condition expreſſed in his Feoffment.

But Popham denied this, as it appeareth by Littleton Tit. Deſcents, becauſe he hath his Eſtate ſubject to the ſame Condition, and in the ſame manner as his Feoffor hath it, into whomſoever hands it happeneth to come, and therfore the Confirmation ſhall not diſcharge the Condition, but is only to bind the right of him who made it in the poſſeſſion of him to whom it is made but not upon Condition.

Morgans

Morgans *Caſe*.

7. RObert Morgan Eſquire, being ſeiſed in his Demeſne as of Fee, of certain Lands called Wanſter Tenements in Socage, having Iſſue John his eldeſt Son, Chriſtopher his ſecond Son, and William his youngeſt Son; by his laſt Will in writing, demiſed to the ſaid Chriſtopher and William thus; viz. Joyntly and ſeverally for their lives, ſo that neither of them ſhall alienate the Lands, and if they do, that they ſhall remain to his Heirs. Robert the Father dies, and afterwards John his Son and Heir dies without Iſſue, the reverſion by this deſcends to the ſaid Chriſtopher who dies, leaving Iſſue. And upon this Caſe made in the Court of Wards, the two chief Juſtices Popham and Anderſon agreed firſt, That upon the deviſe and death of the Father, the ſaid Chriſtopher and William were Joynt-tenants of the Land, and not Tenants in Common, notwithſtanding the word (ſeverally) becauſe it is coupled with the ſaid word (joyntly.) But yet they agreed alſo, that by the deſcent from John to Chriſtopher, the Fee-ſimple was executed in the ſaid Chriſtopher, for the Moyety in the ſame Manner, as if he had purchaſed the Reverſion of the whole, or of this Moyety, and that it is not like to the Caſe where Land is given, and to the Heirs of one of them; in which caſe for the benefit of the Survivorſhip, it is not executed to divide the Joynture, becauſe the Eſtates are made at one and the ſame time together, and therfore not like to the caſe where the Inheritance cometh to the particular Eſtate by ſeverall and divided means: And a Decree was made accordingly.

Trin. 36. Eliz. In the Kings Bench.

Burglary.

1. IT was agreed by all the Juſtices and Barons of the Exchequer, upon an Aſſembly made at Serjeants-Inn, after ſearch made for the ancient Preſidents, and upon good deliberation taken.

If a man have two houſes, and inhabit ſomtimes in one, and ſomtimes in the other, if that Houſe in which he doth not then inhabit be broken in the night, to the intent to ſteal the Goods then being in his houſe, that this is Burglary, although no perſon bee then in the Houſe, and that now by the new Statute made, ſuch an Offender ſhall not have his Clergy, for before the Statutes were made, which take away Clergy in caſe of Burglary, where any perſon was put in fear, no mention was made in the Inditements of Burglary, that any perſon was in the Houſe: But it was generall that the houſe of ſuch a one Nocta nter fregit, and ſuch Goods then there Felonice cepit. And the breaking of a Church in the night to ſteal the Goods, there is Burglary, although no perſon be in it, becauſe this is the place to keep the Goods of the Pariſh. And in the ſame manner the houſe of every one is the proper place to preſerve his Goods, although no perſon be there: And that the Law was always, ſo it is to be collected by the courſe of the Statutes therof made, for firſt the Statute of 23 H. 8. doth not take Clergy from any in caſe of Burglary, unleſſe ſome of the ſame Family be in the houſe, and put in fear. And in 5 Eliz. 6. The Offendor ſhall be ouſted of his Clergy, if any of the Family be in the houſe, be they ſleeping or waking. And theſe Statutes were the cauſe that it was uſed of late time, to put in the Inditements of Burglary, that ſome perſon of the Family was then in the houſe, to put them from their Clergy. But this doth not prove that it ſhall not be Burglary, but where ſome perſon was in the houſe, and by 18 Eliz. Clergy is taken away in all caſes of Burglary generally, without making

23 H. 8.
5 Eliz.
18 Eliz.

making mention of any perſon to be there, which enforce the reſolution aforeſaid, and according to it, they all agreed hereafter to put it in Execution.

Finch *verſus* Riſeley.

2. IN this Term the caſe betweeen Finch and Riſeley was in queſtion before all the Juſtices and Barons for this, aſſembled at Serjeants-Inn in Fleetſtreet, where after Arguments heard by the Councell of the parties upon this point only.

If the Queen make a Leaſe for years, rendring Rent, with a Proviſo, that the Rent be not paid at the day limited, that the Leaſe ſhall ceaſe, without making mention that it was to be paid at the receit, whether the Leaſe ſhall ceaſe upon the default of payment, before Office found therof?

And by Periam and ſome of the Juſtices, the Leaſe ſtall not ceaſe untill an Office be found of the default, becauſe it is a matter in Fait which determines it, to wit, the not-payment.

And by Gawdy, it ſhall be taken as if it had been for the not-payment, that the Proviſo had been that the Leaſe ſhall be forfeited: In which caſe it is not determined untill Re-entry made for the forfeiture, which in the Queens caſe ought alwaies to be by Office, which countervails the re-entry of a common perſon; As where the Queen makes a Leaſe, rendring Rent, and for default of payment a Re-entry, albeit the Rent be not paid, yet untill Office found therof, the Rent continues.

Popham, Anderſon, and the greater part of the Juſtices and Barons reſolved that it was cleer in this caſe, that Ipſo facto upon the default of payment, the Leaſe was determined, according to the very purport of the contract, beyond which it cannot have any being, and therfore there needs no Office in the caſe. But where it is that it ſhall be forfeited, or that he ſhall re-enter, there untill advantage taken of the forfeiture in the one caſe, or untill re-entry made in the other caſe, the Term alwaies continues by the contract: And where in the caſe of a common perſon, there is need of a re-entry to undo the Eſtate, there in the caſe of the King there needs an Office to determine the Eſtate, for an Office in the Kings caſe countervails an entry, for the King in perſon cannot make the entry: And upon this reſolution of the greater part of the Juſtices in Mich. Term 31, & 32 Eliz. the ſame caſe was in queſtion in the Office of Pleas in the Exchequer, between the ſaid Moil Finch Plaintiff, and Thomas Throgmorton, and others, Defendants, and there adjudged by Manwood late chief Baron, and all the other Barons unanimouſly after long argument at the Bar and Bench, that the Leaſe was void upon default of payment of the Rent according to the Proviſo of the Leaſe, and this immediatly without Office for the reaſons before remembred; upon which Judgment was given, a Writ of Error was brought before the Lord Keeper of the great Seal, and the Lord Treaſurer of England, where it long depended, and after many arguments, the Judgment given in the Exchequer by the advice of Popham and Anderſon was affirmed, and that upon this reaſon, for the Proviſo ſhall be taken to be a limitation to determine the Eſtate, and not a Condition to undo the Eſtate, which cannot be defeated in caſe of a Condition, but by entry in caſe of a common perſon, and but by Office (which countervails an entry) in the caſe of the Queen. And this Judgment was ſo affirmed in Mich. Term, 36, & 37 Eliz.

Smiths *Caſe*.

3 IT was found by Diem clauſit extremum, after the death of Richard Smith, that in conſideration of a marriage to be had between Margaret Smith, and William Littleton a younger Son to Sir John Littleton Knight,

and of 1300. marks paid by the ſaid Sir John to the ſaid Richard, he made aſſurance by Fine of his Lands (being 174 l. a year) viz. Of part therof of the value of 123 l. a year, of which part was holden of the Queen by Knights Service in Capite, to the uſe of himſelf for his life, and after his deceaſe to the uſe of the ſaid William and Margaret, and the Heirs of the body of the ſaid William, begotten on the body of the ſaid Margaret, and for default of ſuch Iſſue, to the uſe of the right Heirs of the ſaid William. And of the reſidue therof, being alſo holden in Capite of the Queen, to the uſe of himſelf for his life, and after his deceaſe to the uſe of the firſt Iſſue Male of the ſaid Richard, and to the Heirs Males of his body, and then to other Iſſues of his body, and for default of ſuch Iſſue, to the ſaid William and Margaret, and the Heirs of the body of the ſaid William, on the body of the ſaid Margaret lawfully begotten, and for default of ſuch Iſſue, to the right Heirs of the ſaid William, with this Proviſo, That it ſhall be lawfull for the ſaid Richard, to make a Joynture to his wife of the Lands limited to his Iſſue Males, and for making of Leaſes for 21. years, or three lives, for any part of the ſaid Land, rendring the ancient Rent, except of certain parcels, and that William died without Iſſue, and that Gilbert Littleton was his Brother and Heir, and that the ſaid Margaret married the ſaid George Littleton youngeſt brother to the ſaid William, which are yet living: And that the ſaid Richard married Dorothy, and made her a Joynture according to the Proviſo: And that the ſaid Richard had Iſſue John Smith, and died, the ſaid John being his Son and Heir, and within age.

After which, a Melius inquirendum iſſued, by which it was found, that the ſaid Margaret was the Daughter of the ſaid Richard, and that the ſaid Land was of the value of 12000 l. at the time of the aſſurance: And how much of the Land ſhall be in ward, and what Land, and what the Melius inquirendum makes in the caſe, was the queſtion put to the two chief Juſtices, Popham and Anderſon, who agreed, that the Queen now ſhall have the third part, as well of that which was aſſured to William and Margaret, immediatly after the death of the ſaid Richard, as of that which was limited to Dorothy for the life of the ſaid Margaret, for although money were paid, yet this was not the only conſideration why the Lands were aſſured, but the advancement of the Daughter, and now by the ſurviving of the ſaid Margaret, ſhee ſhall be ſaid to be in the whole, which was aſſured to her by her Father, and for her advancement, and the Land (as it appears) was of greater value then the money given, and may as well be thought to be given for the Remainder of the Fee. And agreeable to this was the caſe of Coffin of Devonſhire, about the beginning of the Raign of the now Queen, which was that the ſaid Coffin for moneys paid by one Coffin his Coſin (having but Daughters himſelf) conveyed his Land to the uſe of himſelf and his wife, and to the Heirs Males of his body, and for default of ſuch Iſſue to the uſe of his ſaid Coſin and his Heirs, for which, his ſaid Coſin was to give a certain ſum of money to the Daughters for their marriage: Coffin dies, his ſaid Daughters being his Heirs and within age, and were in ward to the Queen, the Lands being holden by Knights Service in Capite: And the third part of the Land was taken from the wife of Coffin for the life of the ſaid wife, if the Heirs continue ſo long in Ward.

And it was alſo agreed by them and the Councell of the Court, that the Melius inquirendum was well awarded, to certifie that the ſaid Margaret was the Daughter of the ſaid Richard, of which the Court could not otherwiſe well take Conuſance, for they thought that it was not matter to come in by the averment of the Attorney-generall, as Dyer hath reported it: But now by the Statute, it ought to be found by Inquiſition, and being a thing which ſtands with the former Inquiſition, it ought to be ſupplied by the Melius inquirendum: for the ſame Statute which gives the Wardſhip in caſe where

Land

Land is conveyed for the advancement of the Wife, or Infants, or for the ſatisfaction of Debts and Legacies of the party by the implication of the ſame Statute, this may be found by Inquiſition; and if it be omitted in the Inquiſition, it ought to be found by a Melius inquirendum, but not to come in by a bare ſurmiſe. And therfore if in the Inquiſition it be found, that the Anceſtor had conveyed his Land by the Melius inquirendum, it may be found that it was for the payment of his Debts or Legacies, or that the party to whom, or to whoſe uſe it was made, was the Son, or Wife of the party that made it, and that by the very purport of the Statutes 32. & 34 H. 8. as by Fitzherbert, if it be ſurmiſed, that the Land is of greater value then it is found, a Melius inquirendum ſhall iſſue, and ſo ſhall it be if it be found that one is Heir of the part of the Mother, but they know not who is Heir of the part of the Father; ſo if it be not found what Eſtate the Tenant had, or of whom the Land was holden: ſo upon ſurmiſe made, that he is ſeiſed of ſome other Eſtate, or that he held it by other Services, by Fitzherbert a Melius inquirendum ſhall Iſſue, and upon this order given, it was decreed accordingly this Term.

Morgan *verſus* Tedcaſtle.

4. IN the ſame Term upon matter of Arbitrement between Morgan and Tedcaſtle, touching certain Lands at Welburn, in the County of Lincoln, put to Popham, Walmeſley, and Ewens Baron of the Exchequer: Wheras Morgan had granted to Tedcaſtle a 100. acres of Land in ſuch a field, and 60. in ſuch a field, and 20. acres of Meadow in ſuch a Meadow in Welburn and Hanſtead, in which the acres are known by eſtimations or limits, there he ſhall take the acres as they are known in the ſame places, be they more or leſſe then the Statute, for they paſſe as they are there known, and not according to the meaſure by the Statute. But if I have a great Cloſe, containing 20. acres of Land by eſtimation, which is not 18. And I grant 10. acres of the ſame Cloſe to another, there he ſhall have them, according to the meaſure by the Statute, becauſe the acres of ſuch a Cloſe are not known by parcels, or by meets and bounds, and ſo it differeth from the firſt caſe: And upon the caſe then put to Anderſon, Brian, and Fennor, they were of the ſame opinion: Quod nota.

Humble *verſus* Oliver.

5. IN Debt by Richard Humble againſt William Oliver, for a Rent reſerved upon a Leaſe for years, the caſe was this; Thomas Plain was ſeiſed in his Demeſne as of Fee, of a Meſſuage in S. and ſo ſeiſed, did let it to the Defendant for divers years yet to come, rendring Rent, payable at four uſuall Feaſts of the year, the Leſſee entred accordingly, after which the ſaid Plain by Bargain and Sale enrolled, conveyed the Reverſion therof to the ſaid Humble and his Heirs, and before the Feaſt of the Annunciation of our Lady, 35 Eliz. to wit, the 1. day of February, in the ſame year the ſaid Oliver aſſigned over his whole Term to one Southmead, who before the ſame Feaſt entred accordingly, and for the Rent due at the Feaſt the Annunciation of our Lady, the Plaintiff brought this Action: And it was agreed by the whole Court that the Action would not lie againſt him; for although Plain (if he had not alienes the Reverſion over) might have had this Action againſt the ſaid Oliver, notwithſtanding that he had aſſigned over his Term before, for the privity of contract which was between them, in as much as they were parties to it of either part, yet the Grantee of the Reverſion ſhall not

not have advantage of the privity, he being a meer ſtranger to the Contract, and now was but privy in Law by the Bargain, and therfore now he hath no remedy but againſt him who had the Eſtate at the time when the Rent happned to be due; and this is Southmead, and not Oliver. The Roll of this caſe is in the Kings Bench, Hill.36.Eliz.Rot.420.

Mich. 36, & 37 Eliz. In the Kings Bench.

Button *verſus* Wrightman.

1. IN an Ejectione firmæ, between John Button Plaintiff, and Etheldred Wrightman Widow, and other Defendants; for a Houſe and certain Lands in Harrow. The Caſe upon a ſpeciall Verdict was this; The Dean and Chapter of Chriſts Church in Oxford, were incorporated by H. 8. by his Letters Patents, dated 4. Novemb. 38 H. 8. by the name of the Dean and Chapter of the Cathedrall Church of Chriſt, &c. Oxford, of the Foundation of King Henry the 8th. and ſo to be called for ever; after which the ſaid Dean and Chapter was ſeiſed in their Demeſne as of Fee, of the ſaid Houſe and Land, and ſo being ſeiſed by the name of the Dean and Chapter Eccleſiæ Cathedralis Chriſti in Accademia Oxon. ex fundatione Reg. H. 8. enfeoffed Edward, late Lord North therof, by their Deed, bearing date the 21. day of April, 1. E. 6. who afterwards dyed, and the now Lord North entred, and did let it to the Plaintiff, who was ouſted by the Defendant, claiming the ſaid Houſe by a Leaſe made by the ſaid Dean and Chapter in the time of Queen Elizabeth, for divers years yet to come, and whether his entry were lawfull, or not, was the queſtion, and all depends upon the miſ-naming of the Corporation: But it was found that the City of Oxford, and the Univerſity of Oxford were all one, and that the Town of Oxford was made a City by the Charter of King H. 8.

And by Fennor, the Feoffment made to Edward Lord North, for the miſnaming of the Corporation, was void, for he ſaid, that Accademia & villa de Oxford, are divers in name, and divers in nature, for the Univerſity is to the Schollars and learned men there, and the Town for the Inhabitants, and the name of a place is a principal thing in a Corporation, which in a new Corporation ought to be preciſe, according to the very Letter of the Charter therof: And therfore in the caſe of Cheſter it was agreed, that Ceſtria being omitted, the Charter for the Dean and Chapter there had been void.

But by Popham, Gawdy, and Clench, this is not ſuch a miſ-naming as to the place which ſhall make the Feoffment void: for ſuppoſe it had been Decanus & Capitalis Eccleſiæ Cathedralis Chriſti in Civitate Oxon. it had been good, for Oxon. & Civitas Oxon. are one and the ſame. So it is if an Hoſpitall be erected by the name of the Hoſpitall of S. Johns in S. Clements; and they make a Grant by the name of the Hoſpitall of S. Johns in the Parish of S. Clements, it is good, for it appeareth to be the ſame: And here if a man will ſay, that it ſhall go to the Univerſity of Oxford, this every one conceives to be the Town of Oxford, and ſo of Cambridge, and therfore in 8 H. 6. it was agreed to be a good addition for the place in an Action perſonall, againſt ſuch a one Chancellor of the Univerſity of Oxford, and ſo it is againſt J. Rector of the Parish Church of Dale, without any other addition for the place, yet the Statute is, that it ought to be named of what Town, Hamlet, or place the party is. And by Popham, the place in a Corporation may well be reſembled to the Sur-name of a man, and as a Grant made by any perſons Chriſtian name, as John, Thomas, &c: is not good, ſo in a Corporation it is not good to ſay, Dean, and Chapter, Mayor, and Comminalty, and the like, without

without saying, of what place: And anciently men took most commonly their Surnames from their places of habitation, especially men of Estate, and Artizans often took their names from their Arts, but yet the Law is not so precise in the case of Surnames, and therfore a Grant made by, or to John, Son and Heir of I.C. or Filio juniori I.S. is good: But for the Christian name, this alwaies ought to be perfect.

So in the case of a Corporation, it sufficeth to have a sufficient demonstration of the place where the Corporation is, albeit it be not by the precise words comprised in the Charter: as in naming Accademia Oxon. pro Villa Oxon, and it is common, of which I have seen divers Charters, where a Town was incorporated by the name of Mayor, and Comminalty of such a Town, as Bristoll, Exeter, and others, which afterwards have been made Cities, and yet Charters made to them, and Grants made by them, by the name of Mayor and Comminalty of the City is good, but more precisenesse is used in the body of the name of a Corporation before the place to which they are annexed, and yet in them, that which is but an ornament to the name comprehended in the Charter, shall not hurt the Grant, as of Chapiter, of S. George of Windsor, if it be of S. George the Martyr, and the like, the Grant by such a name is good, because the Martyr is but an addition of Ornament to the name comprised in the Charter, and it is no other but the same in re vera. So here, if it had been Domini nostri Jesu Christi, because it is the same, and is but an ornament to the word Christ comprised in the Charter, and so should it be also if it had been Christi filii Dei Salvatoris nostri, because it is but a true addition to the same; wherupon Judgment was given for the Plaintiff, as appeareth in the Kings Bench, Pas. 35 E. Rot. 258.

And Popham said further in this case, that to erect an Hospitall by the name of an Hospitall, in the County of S. or in the Bishopprick of B. and the like, is not good, because he is bound to a place too large, and incertain: But a Colledge erected in Accademia Cantabrig. or Oxon. is good, and some are so founded because it tends but to a particular place, as a City, Town, &c.

King *versus* Bery *and* Palmer.

2. IN an Ejectione firmæ, brought by William King against John Bery and William Palmer Defendants, for two Messuages and certain Lands in Halstead in the County of Leicester, upon a Demise alledged to be made by Dorothy Pool, and Robert Smith, the case upon a speciall Verdict was this; The said Dorothy was Tenant for life of the said Tenants, the Remainder over to the said Robert Smith and his Heirs, and they being so seised made the Lease in the Declaration, upon which the Action was brought. And per curiam, the Lease found by the Verdict doth not warrant the Lease alledged in the Declaration; for although they joyned in the Demise, yet during the life of the said Dorothy it is her Demise, and not the Demise of the said Robert Smith; but as his confirmation for that time: for he hath nothing to do to meddle with the Land during the life of the said Dorothy, but after the death of the said Dorothy then it shall be said to be the Demise of the said Robert Smith, and not before, because untill this time Smith hath nothing to do to meddle with the Land. And in a more strong case, If Tenant for life, and he in the Reversion in Fee make a Gift in tail, for the life of Tenant for life, it shall be said to be his Gift, but after his death it shall be said the Gift of him in the Reversion, and if the Estate tail had expired during the life of the said Tenant for life, he shall have the Land again in his former Estate, and there shal be no forfeiture in the case, because he in the Reversion of the immediate Estate of Inheritance had joyned in it, and therfore hath dispensed with that which otherwise had been a meer forfeiture of the Estate for life, wherby it was awarded by the Court that the Plaintif take nothing by his Bill in 33. & 34 Eliz. Rot. And the Judgment is entred, Hill. 34. Eliz. Rot. 72.

3. In this Term I hapned to see a Case agreed by the Justices in 3. & 4. Eliz. which was this:

If a man make a Lease of two Barns, rendring Rent, and for default of payment, a Re-entry, if the Tenant be at one of the Barns to pay the Rent, and the Lessor at the other to demand the Rent, and none be there to pay it, that yet the Lessor cannot enter for the Condition broken, because there was no default in the Tenant, he being at one, for it was not possible for him to be at both places together.

And upon this Case now remembred to the Justices, Popham, Walmesley, and Fennor said, That perhaps also the Tenant had not money sufficient to have been ready to have paid it, at either of the said places, but it is sufficient for him to have and provide one Rent, which cannot be at two places together.

And by the Case reported here also; If Lands and Woods are demised together, the Rent ought to be demanded at the Land, and not the Woood, because the Land is the more worthy thing, and also more open then the Wood: And therfore by the three Justices aforesaid, Rent ought not to be demanded in any private place of a Close, as amongst Bushes, in a Pit, or the like, nor in the open and most usuall passage therof, as at a Stile, Gate, and the like.

4. Upon a Prohibition sued out of the Kings Bench, the Case appeared to be this.

The late Lord Rich, Father to the now Lord Rich devised, to his Daughter, for her advancement in marriage 1500. upon condition, that she marry with the consent of certain friends, and deviseth further, that if his Goods and Chattels are not sufficient to pay his Debts and Legacies, that then there shall be 200 l. a year of his Lands sold to supply it, and dies, making the now Lord Rich his Executor, his Goods and Chattels not being sufficient to pay the Debts of the Testator, as was averred, the said Daughter married with a Husband against the will of those who were put in trust to give their assents; and the Husband and the Wife sued in the Spirituall Court for the Legacy: And it was surmised that they would not allow the proofs of the said now Lord Rich, exhibited to prove the payment of the Debts of his Testator; and further, that they would charge him for the sale of the Land; upon which matter the Prohibition was granted to the Delegates, before whom the matter depended, and now consultation was prayed in the case.

Upon which it was affirmed by a Doctor of the Civill Law, that they will allow the proofs for the payment of the Debts, according to our Law, and that the Legacy shall not be paid untill the Debs are satisfied. But he said, that by the Law, if the Executor do not exhibit his Inventory, but neglect it for a year, or more, that then if any omission or default be in the true value of the Inventory exhibited, that then such on Executor for this default shall pay all the Legacies of his Testator, of what value soever they are, not respecting the Debts, or the value of the Goods or Chattels, how small soever the omission, or default be in the Inventory; And so he said was the case of the now Sir Richard S. who did not bring in the Inventory for four years after the death of the Testator, and that in the Inventory exhibited, the values of every thing were found to be too small, and therfore to be charged by their Law, albeit he hath not Goods and Chattels sufficient of the Testators. To which it was answered, that this was quite without reason, for by such means every Subject of the Realm may be utterly defeated, if he take upon him the charge of an Executorship: And if this shall be admitted, no man will take upon him the Execution of the Will of any, and by such a means none will have their Wills performed, which shall be too inconvenient

nient. And they ſaid further, that in as much as Debts are to be proved by the Common Law of the Realm, thoſe of the Eccleſiaſticall Courts ought to admit in the proof therof, ſuch proofs as our Law allows, and not according to the preciſeneſſe of their Law: And although by their Law ſuch a Condition as before being annexed to a Legacy, is void, becauſe that marriage ought to be free without Coercion, yet where we are to judge upon the point (as we are here) if the Execution happen to be charged becauſe of the ſale of Land, and for the money coming therof, a prohibition ſhall be granted to the Eccleſiaſticall Judge in ſuch a caſe, wherby the Court granted a ſpeciall conſultation in the Caſe, to wit, that they proceed for the Legacy, provided, that they charge the Executor no further then he hath in Goods and Chattels of the Teſtator, after his true and due Debts are ſatisfied: And that in the caſe of the proof of theſe Debts, they allow ſuch proofs as by the Law of the Land are holden to be ſufficient in ſuch a caſe; Quod nota benè, as to the reſtraining of Eccleſiaſticall Courts in their proceedings, to bind any ſubject touching his private temporall Eſtate, againſt all reaſon: And as to it, that they do not intermeddle in any thing belonging to the Common Law of the Realm, as Debts, and the like, againſt the due courſe of the Common Law.

Cawdry *verſus* Atton.

5. IN Treſpaſſe brought by Robert Cawdry Clerk, againſt George Atton, for breaking his Cloſe at North Luffenham in the County of Rutland, upon not guilty, and a ſpeciall Verdict, the Caſe appeared to be this, to wit, that the Plaintiff was Rector Eccleſiæ de North Luffenham aforeſaid, of which the place was parcell, and being ſo ſeiſed, was deprived of his Rectory by the late Biſhop of London and his Colleagues, by virtue of the high Commiſſion to them and others diverted, becauſe he had pronounced and uttered ſlanderous and contumelious words againſt, and in deprivation of the Book of Common-prayer; But the form of the ſentence was, that the ſaid Biſhop by, and with the aſſent and conſent of five others of the ſaid Commiſſioners his Companions, and namely which deprived him. *Vide* this Caſe Cole lib. 5. 1. *pa.*

And further, it was not found, that the Commiſſioners named were the naturall Subjects born of the Queen, as the Statute enacts that they ſhould be: And if the deprivation be void, then they find the Defendant guilty, and if it were good, then they find him not guilty. And it was moved that the deprivation was void.

Firſt, becauſe that wheras the Commiſſion is to them, or any three of them, of which the ſaid Biſhop to be one amongſt others, it ought to have been the ſentence of them all, according to the authority given to them, which is equall, and not that it was done by one with aſſent of the other. Then becauſe it is not found that the Commiſſioners are the naturall Subjects of the Queen born, as by the words of the Statute they ſhould be.

Another is, becauſe the puniſhment which the Statute provides for thoſe of the Miniſtry which deprave this Book, is to looſe the profits of all their Spirituall Promotions but for a year, and to be impriſoned by the ſpace of ſix months, and not to be deprived untill the ſecond Offence, after that he had been once committed, and therfore to deprive him for the firſt offence was wrongfull and contrary to the Statute. But by the whole Court for the form of the deprivation, it is, that which is uſed in the Eccleſiaſticall Courts, which alway names the chief in Commiſſion, that are preſent at the beginning of the Sentence, and for the other they mention them only as here, but of their aſſent and conſent to it, and in ſuch caſes we ought to give credit to their form, and therfore tis not to be compared to an authority given at Commen Law by Commiſſion.

And

And for the matter that is not found, that the Commiſſioners were the naturall Subjects of the Queen born, it is to be intended that they were ſuch, unleſſe the contrary appear: But here at the beginning it is found that the Queen, ſecundum tenorem & effectum actus prædict. had granted her Commiſſion to them in cauſis Eccleſiaſticis, and therfore it appeareth ſufficiently that they were ſuch as the Statute wills them to be.

And for the deprivation, they all agreed that it was good, being done by the authority of the Commiſſion, for the Statute is to be underſtood where they proſecute upon the Statute by way of Inditement, and not to reſtrain the Eccleſiaſticall Juriſdiction, being alſo but in the Affirmative.

And further by the Act and their Commiſſion, they may proceed according to their diſcretion to puniſh the offence proved or confeſſed before them, and ſo are the words of their Commiſſion warranted by the clauſe of the Act.

And further, the Eccleſiaſticall Juriſdiction is ſaved in the Act.

And further, all the Biſhops and Popiſh Prieſts were deprived by virtue of a Commiſſion warranted by this clauſe in the Act: And now lately it was agreed by all the Juſtices, that a Fine of 200. marks ſet upon one for a vitious liver by the high commiſſion was warranted by virtue of the Commiſſion and Act: And therfore if the Act with the Commiſſion, are to be conſidered in this caſe, wherupon it was agreed that the Plaintiff ſhould take nothing by his Writ: Which you may ſee, Hill. 33. Eliz. Rot. 315.

Hall *verſus* Peart.

6. IN an Ejectione firmæ brought by William Hall Plaintiff, for Land in D. in the County of Somerſet, upon a Leaſe made by William Dodington againſt John Peart and other Defendants, upon a ſpeciall Verdict the caſe appeared to be this.

Vide this caſe in Cook lib. 2 32, 33. by the name of *Dodingtons* caſe.

That one John Brown was in poſſeſſion of certain Lands in D. aforeſaid, which before were parcel of the poſſeſſions of the Hoſpitall or Priory of S. Johns in Wells, the Inheritance therof then being in the late King H. 8. by the Act of diſſolutions: And the King being ſo ſeiſed by his Letters Patents, dated 26. of March, 30 H. 8. ex gratia ſpeciali, certa ſcientia & mero motu ſuo, granted to John Aylewoth, and Ralph Duckenfield, omnia illa Meſſuagia Ter. Tenemt. & gardina ſua & quæcunque tunc in ſeparabilibus tenuris diverſarum perſonarum, which he named particularly, amongſt which the ſaid John Brown was one in Civitate Wellen. ac in ſuburbiis ejuſdem Civitat. & extra eandem civitat. within the Juriſdictions and Liberties of the ſaid City, late parcell of the poſſeſſions of the ſaid Hoſpitall, and that the ſaid John Brown had not then any other Lands late parcel of the poſſeſſions of the ſaid Hoſpitall, but this in D. and that this Land was quite out of the ſaid City of Wells, and of the Suburbs therof, and alſo out of the Liberties and Juriſdiction of the ſaid City, and yet it was found that it was in the particular and parcell of the value, and valued in it in the Tenure of the ſaid John Brown at 6 s. 8 d. a year, and the grant was to the ſaid John Aylewoth and Ralph Duckenfield, and to the Heirs of the ſaid John Aylewoth for ever.

And it was moved that the Grant was good to the ſaid Ayleworth and Duckenfield, becauſe of the Statute of non-recitall and miſ-recitall, becauſe it appeareth by the particular, and value that it was intended to be paſſed: And if this doth not paſſe, nothing can paſſe which was in the Tenure of the ſaid Brown, becauſe he had nothing in the places compriſed in the Patent.

But it was agreed by all the Court, that it ſhall not paſſe by the ſaid Patent in this caſe, for the word (illa) is to be reſtraind by that which follows in the Patent, where it depends upon a generality, as here, and that it refers but to that in Wells, as the liberty of that which was parcell of the poſ-

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ſeſſions of the ſaid Hoſpitall, and in the Tenure of the ſaid John Brown: And if it were not of theſe poſſeſſions, or not in Wells, &c. or not in the Tenure of the ſaid John Brown, it ſhall not paſſe, for the intent of the King in this caſe ſhall not be wreſted according to the particular or the value, which are things collaterall to the Patent, but according to his intent compriſed in, or to be collected by the Patent it ſelf.

And Popham ſaid, that by Grant of omnia, terras Tenementa & Hereditamenta ſua in caſe of the Queen nothing paſſe, if it be not reſtraind to a certainty, as in ſuch a Town, or late parcell of the Poſſeſſions of ſuch a one, or of ſuch an Abbey, or the like, in which caſes it paſſeth, as appeareth by 32 H.8. in caſe of the King: But if it be Omnia, terras & tenementa ſua vocat. D. in the Tenure of ſuch a one and in ſuch a Town, and late parcell of the poſſeſſions of ſuch a one, there albeit the Town or the Tenant of the Land be utterly miſtaken, or that it be miſtaken of what poſſeſſions it was, it is good, for it ſufficeth that the thing be well and fully named, and the other miſtakes ſhall not hurt the Patent.

And the word of Ex certa ſcientia, &c. will not help the Patent in the principall caſe. And the caſe of 29 E. 3. is not to be compared to this caſe, for it was thus.

The King granted the Advowſon of the Priory of Mountague (the Prior being an Alien) to the Earl of Salisbury and his Heirs for ever: And alſo the keeping and Farm with all the Appurtenances and Profits of the ſaid Priory, which he himſelf had during the War, with the keeping of certain Cells belonging to the ſaid Priory; the ſaid Earl died, William Earl of Salisbury being his Son and Heir, and within age, whereupon the King reciting that he had ſeiſed the Earls Lands into his hands after his death, for the Nonage of the Heir, he granted to the ſaid Earl all his Advowſons of all the Churches which were his Fathers, and all the Advowſons of the Churches which belong to the Prior of Mountague, to hold untill the full age of the ſaid Heir, *& quas nuper conceſſit prefat. Comiti patri, &c.* In which caſe, although the King had not granted the Advowſons to the ſaid Earl the Father aforeſaid, by the former Patent, becauſe no mention was of the Advowſons thereof, yet they paſſe by this Patent, notwithſtanding that which follows after, to wit, and which he granted to the Father of the Grantee: But there it is by a Sentence diſtinct, and not fully depending upon the former words, as here, to wit, *Omnia illa Meſſuagia, &c* in Wells, in the Tenure of the party, parcell of the Poſſeſſions of ſuch an Hoſpitall, or Priory: *Quod nota*, and the difference.

And becauſe the Defendant claimed under the firſt Patent, and the Plaintiff by the latter Patent, it was agreed, that the Plaintiff ſhould recover: Which you may ſee in the Kings Bench.

Harrey *verſus* Farcy.

7. IN an Ejectione firmæ brought by Richard Harrey Plaintiff, for the Poyety of certain Tenements in North-petherton, in the County of Somerſet, upon a Leaſe made by Robert Bret againſt Humfrey Farcy Defendant, upon not guilty, and a ſpeciall Verdict found, the caſe appeared to be this, to wit, That Robert Mallet Eſquire, was ſeiſed of the ſaid Tenements, in his Demeſne as of Fee, and ſo ſeiſed demiſed them to John Clark, and Elianor Middleton, for term of their lives, and of the longer liver of them, after which the ſaid Tenements (amongſt others) were aſſured by Fine to certain perſons and their Heirs, to the uſe of the ſaid Robert Mallet for term of his life, and after his decaſe to the uſe of John Mallet his Son and Heir of his body, and for default of ſuch Iſſue, to the uſe of the right Heirs of the ſaid Robert Mallet.

After which the ſaid Robert Mallet (having Iſſue the ſaid John Mallet, Chriſtian, and Elianor Mallet) died, the ſaid John Mallet then being within age, and upon Office found in the County of Devon, for other Lands holden of the Queen in Capite by Knights Service was for it in Ward to the Queen: Afterwards the ſaid John Mallet died without Iſſue during his Nonage, and the Lands aforeſaid thereby deſcended to his ſaid two Siſters, to whom alſo deſcended other Lands in the County of Devon, holden of the Queen in Capite by Knights Service, conveyed alſo by the ſame Fine in like manner, as the Lands in North Petherton, the ſaid Chriſtian then being of the age of 22. years, and the ſaid Elianor of the age of 15. yeares, upon which the ſaid Chriſtian and Elianor, 12. Novemb. 31 Eliz. tendred their Livery before the Maſter of the Wards, and before the Livery ſued, the ſaid Chriſtian took the ſaid Robert Bret to husband, and the ſaid Elianor took to husband one Arthur Ackland; after which in the Utas of the Purification of our Lady, 32 Eliz. the ſaid Robert Bret and Chriſtian his wife, levied a Fine of the ſaid Tenements in North-petherton, amongſt others to George Bret and John Peckſey, Sur conuſance de droit come ceo que ils ont de lour done, by the name of the Hoyety of the Mannor of North petherton, &c. with warranty againſt them and the Heirs of the ſaid Chriſtian againſt all men, who tendred it by the ſame Fine to the ſaid Robert Bret and Chriſtian, and the Heirs Males of their bodies, the remainder to the Heirs Males of the body of the ſaid Chriſtian, the remainder over to the right Heirs of the ſaid Robert Bret, which Fine was engroſſed the ſame Term of S. Hillary, and the firſt Proclamation was made the 12th. day of February in the ſame Term; the ſecond, the firſt day of June in Eaſter Term, 32 Eliz. The third, the 8th. day of July in Trinity Term next: And the fourth Proclamation was made the 4th. day of October, in Michaelmas Term next after. And the ſaid Chriſtian died without Iſſue of her body. The 9th. day of February, 32 Eliz. between the hours of 3. & 7. in the afternoon of the ſame day. And the 22. of March, 32 Eliz. the ſaid Robert Bret by his writing indented, dated the ſame day and year, for a certain ſumm of money to him paid, by the Queen, bargained and ſold, gave and granted the ſaid Tenements to the ſaid Queen, her Heirs and Succeſſors for ever, which Deed was acknowledged the 25th. day of March, 32 Eliz. and enrolled in the Chancery the 12th. day of May, in the ſame year: And there was a Proviſo in the ſame Deed, that if the ſaid Robert Bret ſhall pay to the Queen at the receipt of the Exchequer 5 l. of lawfull money, that then the ſaid Gift, Grant, Bargain, and Sale ſhall be void, and that from thence-forward it ſhall be lawfull for the ſaid Robert Bret and his Heirs to re-enter into the ſaid Tenements, and in the mean time between the Inrolement of this Deed: And the ſaid 14th. day of Octob. to wit, the 15th. day of September, 32 Eliz. the ſaid Arthur upon the ſaid Tenements in North-petherton, entred and claimed the Reverſion therof in the right of the ſaid Elianor his wife, by reaſon of the death of the ſaid Chriſtian: And that afterwards, to wit, the 30th. day of February, 33 Eliz. the ſaid Robert Bret to redeem the ſaid Tenements out of the Queen, paid the ſaid 5 l. at the receipt of the Exchequer, which payment is there recorded, and enrolled accordingly; after which in September, 34 Eliz. the ſaid Arthur and Elianor ſued out a ſpeciall Livery of the ſaid Elianor, out of the hands of the Queen, of all the Lands ſeiſed into the hands of the Queen by reaſon of the Nonage of the ſaid John Mallet. And afterwards in the ſame moneth of September, 34 Eliz. the ſaid Arthur and Elianor ſued out another ſpeciall Livery, as Heir to the ſaid Chriſtian, of all the Lands which were in the Queens hands by the death of the ſaid Chriſtian.

And it was further found, that the ſaid John Clark and Elianor Middleton, died after the 5 l. paid as before, and that the ſaid Robert Bret entred the 8th. day of October, 34 Eliz. and then made the Leaſe to the Plaintiff, upon which

which the Defendant by commandment of the ſaid Arthur, and with him entred upon the Plaintiff; and the generall queſtion was, Whether the entry of the Defendant were lawfull? But no ouſter of the Plaintiff was found.

And by Clench, and Fennor, a Fee-ſimple paſſe at Common Law by a Fine levied by him in Reverſion, or Remainder in Tail, becauſe a Fine is ſaid to be a Feoffment of Record, and by their entry and Feoffment a Fee-ſimple paſſe in ſuch a caſe at Common Law.

But by Popham, and Gaudy, a Fee-ſimple doth not paſſe, nor nothing but that which Tenant in Tail may lawfully grant over, which is for his life, in which he ſaid, that Littleton was plain in all caſes of Grant, although it be by Fine, and a Fee-ſimple does not paſſe at Common Law, but where the Fee may be drawn out of him who had the Reverſion or Remainder in Fee thereupon, if ſuch a Reverſion or Remainder had been in a ſtranger, which had not been in this caſe, if the Reverſion or Remainder had been in a ſtranger; and therfore a Diſcontinuance cannot be of an Intail where the Reverſion or Remainder is in the King.

But by them all, however it was at Common Law, it is cleer upon the Statute of Fines, that a Fee-ſimple determinable paſſe by ſuch a Fine as ſoon as the Fine is levied, becauſe every Fine by preſumption of Law ſhall be taken to be ſuch wherupon proclamation is made, untill the contrary therof appeareth to the Court.

And this is the reaſon why a Quid juris clamat is at this day maintained upon ſuch a Fine, which was not at Common Law before this Statute, or otherwiſe it will never lye. And ſo it was holden lately in the Common Bench, in the caſe of Juſtice Wimondham, and yet we may ſee that the Quid juris clamat ought to be brought before that the Fine be engroſſed, whereby it is manifeſt that now a Fee-ſimple ſhall paſſe by the Fine levied, for the paſſibility of the Proclamations, to wit, that the Proclamations ſhall not be made, and to this Fee-ſimple the Proclamations ſhall enure to make a bar to the Eſtate-tail: But ſuch a Fine by Popham and Gawdy was not any wrong to him who had the Reverſion or Remainder in Fee being levied by him who had a mean Reverſion or Remainder in Tail, depending upon an Eſtate for life, or in Tail precedent.

And itis cleer, that the Proclamations do not make the Eſtate, but enure to the Eſtate made by the Fine, for if an Eſtate be granted in Reverſion for life, or in Tail by Fine, with Proclamations by ſuch a Tenant in Tail, in Reverſion or Remainder, the Proclamations work to this Eſtate, and no further, for alwaies the Eſtate paſſe by the Fine, and the Proclamations make the Bar according to the Eſtate, which paſſe by the Fine before.

But by Clench, Gawdy, and Fennor, the Fee-ſimple which was in the Queen after the Fine levied as before, was divеſted by means of this claim made upon the poſſeſſion of the Queen, ſo that the Proclamations following are of no force to hurt the Eſtate tail, for they ſaid, in divers caſes a poſſeſſion may be invеſted out of the Queen without Office, Petition, or Monſtrans de droit, as the caſe is, where a man deviſe that his Land ſhall be ſold, and in the mean time before the ſale, the poſſeſſion of the Land cometh to the Queen, and afterwards the Land is ſold according to the Will, the Vendee enter, there the Land paſſe from the Queen therby, and is divеſted, and ſo in many other caſes. And in all caſes where the Queens Eſtate is determined, the Subject may enter into the Land without Office, or Ouſter le main, &c. And they ſaid, if it had been in the poſſeſſion of a common perſon, that by ſuch a claim the force of the Fine had been defeated; and this appeareth by the caſe between Smith and Stapleton in the Commentaries, where it is holden that where a Fine is levied with Proclamations by Tenant in Tail of an Advowſon, Rent, or Tithes, by claim made by the Iſſue in Tail, before the Proclamations are paſſed, where the Tenant in Tail is dead, the

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ſame is defeated, and that the Proclamations paſſing afterwards, ſhall not be of force to bar the Intail.

And they ſaid, that the conveyance therof to the Queen after the Fine levied, doth not make it to be in worſe caſe; And admit it will not ſerve againſt the Queen, yet the claim will ſerve againſt Bret, when he had entred by the performance of the Condition.

And Clench and Gawdy ſaid, that Bret ſhall not take advantage of this covenous Deed made by himſelf, of very purpoſe to bar the party who had right, and to put him without remedy, no more then where the Diſſeiſor enfeoff his Father who dies ſeiſed, he ſhall not take advantage of this deſcent, or if he who hath cauſe of Action to recover Lands by Covin, cauſeth another to enter into the Lands, to the intent to recover againſt him, and does it accordingly for the Covin, the Recovery ſhall be avoided, and in the ſame manner here.

But Popham took a diverſity, where the Poſſeſſion or the Eſtate of the Queen is determined, and where not, for where the Eſtate is determined, there the Subject may enter into the Land without Office, or ouſter le main: But where the Poſſeſſion continues, there the party ſhall not come to it, unleſſe by petition, Monſtrans de droit officio, or the like, and therfore he ſaid, that if the Queen had an Eſtate pur auter vie, or depending upon any other Limitation, if it be determined according to the Limitation, the party who hath intereſt may enter; ſo in the caſe of the Deviſe put before.

And if a Leaſe be made for life, the Remainder in Tail, the Reverſion in Fee, and he in the Remainder in Tail leby a Fine, Sur conuſance de droit come ceo que il ad de ſon done to a ſtranger, with proclamations according to the Statute, and afterwards the ſtranger convey the Remainder to the Queen, her Heirs and Succeſſors, and after the Tenant for life dies, and after he in the Remainder in tail dies without Iſſue, now may he in the Remainder in Fee enter, becauſe the Eſtate of the Queen is determined: But here the Queen hath a Fee-ſimple in her ſelf but determinable upon the Eſtate-tail which yet remaineth, which Fee-ſimple in Reverſion cannot be diveſted out of the poſſeſſion of the Queen but by matter of Record, of ſo high nature as it is in her, to wit, by Petition, Monſtrans de droit, or the like: As if a Reverſion or Remainder be alienated in Mortmain, the claim of the Lord ſufficeth there to veſt the Reverſion in the Lord for the Alienation, but if the Reverſion or Remainder of which ſuch a claim was made be conveyed to the King, his remedy is now by Office, Monſtrans de droit, or Petition, for claim will not now ſerve him, for this ſhall be to diveſt the poſſeſſion out of the Queen, which by ſuch means cannot be done no more then where a Reverſion or Remainder is granted to the Queen upon Condition, but he ought to have an Office to find the performance of it, if it be to be performed by matter in pais, and without Monſtrans de droit, or otherwiſe it ſhall not be diveſted out of the Queens poſſeſſion, yet in the caſe of a common perſon, a claim will diveſt it out of them, but not ſo of the Queen.

And theſe caſes Gawdy agreed; but he conceived that in the caſe in queſtion, the claim made determines the Eſtate of the Queen, which is made by means of the Fine upon the Statute.

And Popham denied the caſe put in 7 H. 6. to be Law, as it is put upon the opinion of Strange there, for it is cleer, that the claim there does not diveſt any poſſeſſion which was in the King by means of the Wardſhip, and if this be not therby defeated, the claim does not help the Diſſeiſee againſt the Deſcent; and this appeareth fully by Littleton, who ſaith ſo of a Claime which avoids a Deſcent, to wit, that it ought to be ſuch upon which the Diſſeiſee may upon every ſuch Claim made have an Action of Treſpaſſe or Aſſiſe againſt the Diſſeiſor, or him who is in poſſeſſion, if he continue his poſſeſſion after ſuch Claim made, which cannot be in this caſe where the poſ-

ſeſſion

ſeſſion is in the King, which cannot be defeated by ſuch a Claim. And in the Lord Dyer where the Feoffee, or Mortgagee of Lands holden of the Queen in Capite by Knights Service, died before the day of Redemption, his Heir being within age, whereby upon Office found, the Queen had the Wardſhip of the body and land of the Heir, after which the Mortgagee at the day of redemption made payment, and of this alſo an Office was found, yet he could not enter either before or after Office, but upon Monſtrans de droit thereupon he had his Ouſter le main: And the reaſon why a Claim ſhall ſerve in this caſe between common perſons, is, becauſe that by ſuch Claim the thing it ſelf is devеſted out of him who had it before, and thereby actually veſted in him who made the claim: As where a Villain purchaſe a Reverſion by the Claim of the Lord, the Reverſion is actually in him, as it is of a Poſſeſſion by Entry: But where he is put to his Claim to devеſt any thing out of a common perſon, he is put to his Suit to devеſt it out of the Queen.

And to ſay, that Bret ſhould not take advantage of this Conveyance made, to make it good by the Fine.

I think the Law to be clear otherwiſe as to this point, for the Statute of Fines was made for the ſecurity of Purchaſors and Poſſeſſors of Land, and therefore taken more ſtrongly againſt them who pretend Right or Title, and for the greateſt advantage that may be for the Poſſeſſors of Lands, and therefore the Poſſeſſor by what ever means he can, may make his Fine to be forceable? And therefore the Fine upon this Statute differeth much from a Fine at Common Law; for where at Common Law an Infant being a Diſſeiſor was diſſeiſed by one who levies a Fine, and the year and the day paſſe without claim of the firſt Diſſeiſee, now was the firſt Diſſeiſee barred: yet if afterwards the Infant (who was not bound by the Fine) enter, the firſt Diſſeiſee may enter upon him, becauſe that by this entry the Fine at Common Law was utterly defeated.

But now by the Statute, ſuch a Fine being levied with Proclamations, the firſt Diſſeiſee not purſuing according to the Statute, is barred for ever.

And although the Infant enter at full age, and undoes the Fine as to himſelf, yet this Fine remains alwaies to bar the firſt Diſſeiſee, and makes that the Infant hath now Right againſt all the world, and ſo now takes advantage thereof: And this is the intent of the Statute for the repoſe of Controverſies and Suits, and the quiet of the people.

And if I procure a Fine to be levied on purpoſe to bar another of his Action, which he may have againſt me for the Land, yet I ſhall take advantage of this Fine, and the other ſhall have no advantage againſt me, becauſe of this Covin, for if this ſhould be admitted, it will countervail the benefit which is intended to be by means of the Statute of Fines.

And if a Diſſeiſor enfeoffee another upon Condition, to the intent that a Fine with Proclamations ſhall be levied to the Feoffee to bar the Diſſeiſee, and after the Diſſeiſee is barred, the Diſſeiſor enter for the Condition, he ſhall yet take advantage of the Fine againſt the Diſſeiſee.

And Popham put a caſe which was in this Court, 23 Eliz. upon a ſpeciall Verdict which was between Okes Plaintiff, upon the Demiſe of John late Lord Sturton of Cottington which was this.

The Lord Sturton was Tenant for life of certain Lands in Lighe in the County of Somerſet, the remainder in Tail to Charles late Lord Sturton, Father to the ſaid John Lord Sturton; and the ſaid Charles Lord Sturton, diſſeiſed the ſaid Lady Sturton, and levied a Fine of the ſaid Land to Cottington and his Heirs, with Proclamations according to the Statute, and warranted it againſt him, and his Heirs.

And the ſaid Lord Charles dyed before the Proclamations paſt, and the Warranty deſcended upon the ſaid John Lord Sturton, after which, and before the Proclamations paſt, the ſaid Lady Sturton entred upon the ſaid Cottington, after which the ſaid Lady died, and after her death and all the Proclamations paſt, the ſaid John Lord Sturton as Heir in Tail entred, and made the Leaſe to the ſaid Okes, upon whom Cottington the Defendant entred, as under the right of the ſaid Cottington the Conuſee. And I perceiving the Court ſtrongly to incline upon the matter of Warranty, that it ſhall bar the entry of the Heir, and make a diſcontinuance againſt him, according to the inference which is taken by Littleton in his Chapter of Diſcontinuance, becauſe the truth was, and ſo acknowledged to the Court (although it were omitted in the Verdict) that the ſaid Charles Lord Sturton, was attainted of Felony and Murther, and ſo the blood corrupted between the ſaid Charles and John Lord Sturton, wherby in a new Action the Garranty had not hurt the Title of the ſaid Lord John.

I then moved the Court upon the other point of the Fine with Proclamations; and the Court alſo agreed in this point, if the Warranty had not been, that yet the Fine with Proclamations ſhall bar the ſaid John Lord Sturton, notwithſtanding the entry made by the Lady Sturton were before the Proclamations paſt, becauſe that notwithſtanding his regreſſe made, the Reverſion remains in Cottington not defeated by his regreſſe, in reſpect of the Statute which makes that the Fine remains effectuall againſt the Heir in Tail, if nothing be done by him to undo it before the Proclamations paſt as by claim, regreſſe, and the like; but the Act of a ſtranger ſhall not help him, wherby Judgment being therupon given againſt the ſaid Okes, the ſaid John Lord Sturton ſtood ſatiſfied, and the Cottingtons enjoy the Land to this day; whereas, if this opinion of the Court had not been on a new Action, the ſaid Sir John might have been relieved againſt the Warranty.

And Gaudy ſaid, that this was a very good Caſe for the point upon the Statute in this caſe.

Earl of Shrewsbury *verſus* Sir Thomas Stanhop.

Gilbert Earle of *Shrewsbury*, againſt Sir *Thomas Stanhop* in a *Scandalum Magnatum*.

8. GIlbert Earl of Shrewsbury brought a Scandalum Magnatum againſt Sir Thomas Stanhop knight, and it was upon the Statute Tam pro Domina Regina quam pro ſeipſo, &c. For that communication was had between the ſaid Sir Thomas, and one Francis Fletcher, of divers things touching the ſaid Earl, the ſaid Francis at ſuch a day and place, ſaid to the ſaid Thomas,

My Lord (the ſaid Earl meaning) is a Subject (innuendo) that the ſaid Earl was a Subject of the now Queen) the ſaid Sir Thomas then and there ſaid of the ſaid Earl theſe ſlanderous words, to wit, he (intending the ſaid Earl) is ſorry for that (meaning that the ſaid Earl was ſorry that he was then a Subject to our ſaid Soveraign Lady the Queen) that is his grief (meaning that it was grief to the ſaid Earl, that the ſaid Earl was Subj. & to the Queen) to the damage of the ſaid Earl of 20000l. To which the ſaid Sir Thomas Stanhop ſaid, that a queſtion was formerly moved between the ſaid Earl and the Defendant, touching the ſubverſion and drawing away of certain Weares heretofore erected by the ſaid Sir Thomas at Shelford, in the ſaid County of Nott. where the Action was brought to ouſt the River of Trent there, & that for the ſubverſion therof a Petition was exhibited to the privy Councell of the Queen, before the ſpeaking of the ſaid words, by certain Inhabitants of the County of Lincoln, and divers other places not known to the Defendant, with the privity, allowance and knowledge of the ſaid Earl, which Petition at the time of the ſpeaking of the ſaid words, depended before the ſaid Councell not determined, wherupon at the day and place compriſed in the Declaration,

on, there was Communication between the ſaid Defendant and the ſaid Francis Fletcher concerning their purpoſe to have the ſaid Wears ſubverted, and touching the ſaid Petition, upon which the ſaid Francis ſaid to the ſaid Defendant, the matter (meaning the Petition aforeſaid, hanging undetermined before the Councell aforeſaid) is to be heard before the privy Councel (meaning the aforeſaid Councell of the Queen) and what their Honours (meaning the Councell aforeſaid) determine my Lord (the aforeſaid Earl meaning) will willingly obey: To which the ſaid Francis then there anſwered ſaying, My Lord (the aforeſaid Earl meaning) is a Subject, upon which the ſaid Defendant (they then having ſpeech as well of the ſaid Petition, as of the order thereupon to be taken by the ſaid Councell) anſwered ſaying, the words compriſed in the Declaration, meaning that he was ſorry, and grieved that he was ſubject to the order to be made upon the Petition aforeſaid by the ſaid Councell, and averred that this was the ſame ſpeech upon which the Action was grounded: upon which it was demurred in Law, and for cauſe ſhewn according to the Statute it was alledged that the bar was defective, becauſe it is not alledged at what place, nor by whom, nor againſt whom the Petition was exhibited; and alſo becauſe that by the Bar the matter of the Declaration is not confeſſed, avoided, or traverſed, and alſo that the Bar was inſufficient: And it ſeemed to Fenner, that the matter of the Bar had been ſufficient if it had been well pleaded: but the Plaintiff alledgeth the words to be ſpoken in one ſence in the Affirmative, and the Defendant ſhews matter alſo in the Affirmative which proves the words to be ſpoken in another ſence then the Declaration imports, and two Affirmatives can never make a good Iſſue, and therfore the Defendant ought to have taken a traverſe to that which is compriſed in the Declaration, and for want of this traverſe the plea in Bar is not good.

Gawdy ſaid, that the Bar is not ſufficient neither in matter nor form; not in matter, becauſe that wheras Fletcher ſaid, that the ſaid Earl was a Subject, this can have no other ſence, but that he was a Subject to the Queen in his Allegiance and her Soveraignty, and ſo much is drawn out of the courſe of their former ſpeech, and therfore the anſwer which the Defendant made to it refers to his ſubjection of alleagiance, and not to the matter of obedience, which he owed to the order of the ſaid Councell, and if it cannot have any other ſence in good underſtanding, he cannot help himſelf now by an Innuendo, which is in it ſelfe according to common intendment, contrary to that which the nature of the words in themſelves do purport: And if it had been good for the matter, yet it is not good for the form, for want of a Traverſe, for without the Traverſe the plea is not anſwered in that caſe which is laid to the charge of the Defendant.

But Popham and Clench held ſtrongly to the contrary, and that this Bar is good in matter, and (as the caſe is) cannot be otherwiſe, and that the form alſo is good enough, and yet the two Affirmatives cannot make a good Iſſue: but in caſe of two Affirmatives, a Traverſe ſhall not be, but where the Affirmatives do not agree in one. As if the Defendant in Treſpaſſe Intitles himſelf by the Feoffment of a ſtranger, and the Plaintiff reply, and maintain that the ſame ſtranger did enfeoff him, this cannot make a good Iſſue without a Traverſe of the Feoffment alledged to be made to the Defendant.

But in the ſame caſe if the Plaintiff ſaith, that true it is, that the ſtranger enfeoffed the Defendant, but this was to the uſe of the Plaintiff and his Heirs, there no Traverſe ſhall be on the Plaintiffs part, becauſe as to the matter of the Feoffment it agrees with the Defendant, in which caſe it ſhall not take any Traverſe, but there the Traverſe ſhall come on the Defendants part to maintain the Feoffment to his own uſe, Abſque hoc, that the Feoffment was to the uſe of the Plaintiff, for now that which the Defendant ſaith,

(albeit

(albeit it be in the Affirmative) yet it is a Traverſe to that which the Plaintiff hath alledged, and therfore he needs not traverſe the plea: And ſo a diverſity where the Affirmative is, to traverſe that which is alledged by the other party, and where not, for in one caſe the concluſion ſhall be with a Traverſe, and in the other not: Then in this caſe when the Plaintiff alledged that the Defendant ſpake theſe words, which *prima facie* ſhall be intended to be ſpoken in this ſence, as the Plaintiff hath alledged, although no Innuendo had been in the caſe, for if it ſhall not be ſo intended without the Innuendo, the Innuendo will not help it, yet when the Defendant hath declared the circumſtance wherupon theſe words were ſpoken, and then the ſpeaking of them therupon, now he hath confeſſed the very words themſelves to be ſpoken, but upon the circumſtance diſcovered to be in another ſence then *prima facie*, they are to be taken, and therfore he ſhall not take a Traverſe, for he acknowledgeth the very words, but not the intendment which the very Law *prima facie* preſumes upon the words, and therfore ſhall not take a Traverſe: for this intendment of Law being anſwered by matter expreſly in the plea ſhall never be traverſed, as in the caſe put of a Feoffment, *prima facie*, it ſhal be intended to be to the uſe of the Feoffee, yet when the other party maintains that this Feoffment was to his uſe, he ſhall not take a Traverſe to that which the Law intends and preſumes.

And if a man upon ſpeech had with a Hunter, ſaith, That he hath murthered all the Hares within 7. miles of his houſe, and another anſwer and ſay, he is a Murtherer indeed, wherupon the Hunter brings an Action upon the Caſe againſt him, for ſaying, that the Plaintiff was a murtherer, the Action will well lye.

Yet when the other ſhall diſcover the communication wherupon the words were ſpoken, this ſhall be a good Bar without a Traverſe, yet if it be true that there were no ſuch communication between the parties as is mentioned in the Bar, the Plaintiff then hath good cauſe of Action, and therfore he may well ſay, *De injuria ſua propria abſque tali cauſa*, and this being found it ſhall be againſt the Defendant.

So upon ſpeech of a Butcher who had killed a 1000. Oxen in a year, and one hearing it will ſay, that he is a notable Murtherer, this upon the matter diſcloſed is not actionable.

And it ſhall be miſchievous by a Traverſe or by pleading generally not guilty, to put ſuch ſpeciall matter in the mouth of Lay-people to give their Verdict upon, being ignorant, and therfore eaſie to be miſcarried in their judgment, and therfore it ſhall be the rather admitted by ſpeciall pleading to be put to the judgment of the barred Judges, then into the mouths of lay Gents.

And here when Fletcher ſpeaking of the order to be taken by the Councell, upon the Petition ſaid, that the Earl would obey their order, to which the Defendant anſwered, that he knew not what the Earl would do, the ſaid Fletcher ſaid therupon, that he was a Subject, and what was the intent of Fletcher in ſaying ſo? no other, but that becauſe he was a Subject, therfore he ought to obey; and if it be ſo to be underſtood, as of neceſſity it ought, (or elſe they were not ſpoken by Fletcher to any purpoſe, which cannot be intended) then ſhall the words following (being ſpoken therupon by the Defendant) be taken to be ſpoken in anſwer to the matter of the Speeches ſpoken by the ſaid Fletcher, and this, is that he was ſorry, and it was his grief that he muſt be ſo ſubject as to be bound therby to obey their Order: as if a man ſaith to another, that he was ſorry that he was ſo ſubject, that he muſt obey a Judgment againſt him in the Queens Court, this is no cauſe of Action, for this tends but to his ſubjection to the Law, or good order, or the like, which do not give cauſe of Action: As if one ſaith of another, that he is of the Temple, who alwaies rebell againſt the Governours of the ſaid houſe, then ſaith another to him, Will you then ſay and maintain that he is a Rebell?

a Rebell, yes, ſayes one of the other, I will ſo; If an Action be brought for the laſt words, the Action will lye, but if the other diſcover the circumſtances of the Speech in the Bar, wherupon it was ſpoken, the Action will not lye: And this the Defendant may well do without traverſing that which is alledged, becauſe he acknowledgeth it, although in another ſenſe, then the Law *Prima Facie* imports upon the Declaration.

And if in Speech between two, one of them ſaith of a ſtranger, that he hath treacherouſly betrayed his Friend in revealing all his ſecrets, and counſell, wherupon the other then ſaith, that he hath done as a Traytor therin, and the other ſaith to him again, he is a Traytor, and he anſwering to it, ſaith, true, he is a Traytor; Now if the ſtranger brings an Action of the Caſe againſt him, for ſaying of theſe laſt words, *Prima Facie*, it imports good cauſe of Action, without any Innuendo, as that he intended therby that he was a Traytor to the Queen, becauſe the words in common intendment have ſuch a ſence, yet upon the matter diſcloſed by way of Bar, with the circumſtances how they were ſpoken, the Plaintiff ſhall be barred, if he cannot maintain that they were ſpoken without ſuch a cauſe, which alter the intendment that the Law hath otherwiſe of the words.

And Gawdy agreed alſo, that in ſuch caſes the Defendant may plead the generall Iſſue, and upon the matter alſo the Jury ought to find him not guilty.

But Popham and Clench ſayd, that this was a dangerous matter to be put in the mouthes of the Lay Gents, as hath been ſaid before, and therfore to put it to the Iudgment of the Law by pleading.

And for the exception they ought to have ſhewn here, where, by whom, and againſt whom the Petition was delivered, to this they ſaid, that the exception was to no purpoſe, for this was but a conveyance to the Speech uſed, which Speech was the ſubſtance of the Bar; and in this they put the caſe of the Lord Cromwell which was in this Court, 22 Eliz. Rot. 752. In an Action upon the Statute of Scandalum Magnatum, by him brought againſt Thomas Dye Clark, for ſaying to the Lord Cromwel, It is no newes though you like not of me, for you like of thoſe that maintain Sedition againſt the Queens proceedings; in which the Defendant ſaid, that he was Vicar of North Linham, in the County of Norf. and that the Plaintiff mentioned one Vincent Goodwyn Clark at ſuch a time, and one Iohn Trendle at ſuch another time, neither of them being licenced to preach in the ſaid Church, againſt the will of the ſaid Defendant, and ſhew how they ſeverally preached there in their Sermons (and ſhew certainly in what point) Seditious Doctrine againſt the Laws of the Church, as againſt the Croſſe uſed in Baptiſme, and the wearing of the Surplice, and that afterwards in ſpeech therupon between the ſaid Plaintiff and him, the Plaintiff ſaid to the Defendant, That the Defendant was a falſe knave, and ſaid in Engliſh words, that he liked not of the Defendant; wherupon the Defendant ſaid the words compriſed in the Declaration Innuendo, That he liked of the ſaid Goodwyn and Trendle who maintain Sedition (Innuendo) ſeditious Doctrine againſt the Queens proceedings. *Innuendo predict Leges & Stat. Eccleſiæ hujus regni Angl. &c.* And the Plaintiff was put to anſwer, *Scilicet de injuria ſua propria abſque tali cauſa, &c.*

And note in this caſe, the Defendant would firſt have juſtified for the matter preached by one, and it was not allowed by the Court, but he was put to ſpeak to both, or otherwiſe it had not been good, becauſe his ſpeeches were in the plurall number, to wit, That he liked of thoſe, which refers to more then to one. And it was ſaid in this caſe, that the word (Subject) might have ſeverall ſignifications according to the circumſtance wherupon it is ſpoken: As Subiect generally without more, is to be intended of the Queen, but according to the circumſtance, it may be ſaid, Subject of England, or Subject of Ire-

land, or Subject to the Law, or ſubject to any other authority, or power ſet over him, or ſubject to his Affections.

And if a man ſaith of another, that he is a Subject, and therfore he ought to ſerve the Queen in her Warrs, and he anſwers, that he is ſorry for that, and is grieved for it, no Action will lye for this, becauſe the grievance refers to ſervice, which is to be done, and not to his Subjection as a Subject.

Dillon *verſus* Fraine.

See this in Cook lib. 1. 120. by the name of *Chudleighs caſe.*

9. IN Treſpaſſe brought by William Dillon Eſquire, againſt John Fraine, for breaking of his Cloſe at Taveſtock in the County of Devon, called Seden, upon not guilty, and a ſpeciall Verdict, the caſe appeared to be this, to wit, that Sir Richard Chudleigh Knight, was ſeiſed in his Demeſne as of Fee, of the Manor of Heſcot, with the Appurtenances, in the County of Devon, of which the ſaid Cloſe was parcel, and ſo ſeiſed, 26 April, 3, & 4. Phil. & Mar. by his Deed of Feoffment, of the ſame date enfeoffed Sir Tho. Saintleger Knight, and others, and their Heirs, of the ſaid Manor, to the uſe of the ſaid Sir Richard Chudleigh and his Heirs, of the body of the ſaid Elizabeth, then the wife of Richard Bainfield Eſquire, lawfully begotten, and for default of ſuch Iſſue, then to the uſe of the ſaid Sir Richard Chudleigh, and of his Heirs of the bodies of other wives, of other perſons lawfully begotten: And for default of ſuch Heirs, then to the uſe of the performance of the Will of the ſaid Sir Richard Chudleigh for 10. years after his deceaſe, and after the ſaid Term finiſhed, then to the uſe of the ſaid Sir John Saintleger and his Co-feoffees and their Heirs, during the life of Chriſtopher Chudleigh, Son and Heir apparant of the ſaid Sir Richard, and after the death of the ſaid Chriſtopher, then to the uſe of the firſt Iſſue Male of the body of the ſaid Chriſtopher, and to the Heirs Males of the body of this firſt Iſſue Male, and for default of ſuch Iſſue, to the ſecond Iſſue Male of the body of the ſaid Chriſtopher, & to the Heirs Males of the body of this ſecond Iſſue Male, and ſo to the tenth Iſſue Male: And for default of ſuch Iſſue, then to the uſe of Thomas Chudleigh, another Son of the ſaid Sir Richard, and of the Heirs of his body lawfully begotten; And for default of ſuch Iſſue, to the uſe of Oliver Chudleigh another Son of the ſaid Sir Richard, and of the Heirs of his body lawfully begotten: And for default of ſuch Iſſue, to the uſe of Nicholas Chudleigh another Son of the ſaid Sir Richard, and of the Heirs of his body lawfully begotten, and for default of ſuch Iſſue, to the right Heirs of the ſaid Sir Richard Chudleigh for ever; whereby they were ſeiſed accordingly, after which the 17th. of Novemb. 5, & 6. Phil. & Mar. the ſaid Sir Richard died without any Heir of the body of any of the wives before mentioned: And after that the ſaid Chriſtopher took to wife one Chriſtian Strecheley, after which, to wit, the 14th. day of Auguſt, 1 Eliz. the ſaid Sir John Saintleger and the other Feoffees, by their Deed of the ſame date, enfeoffed the ſaid Chriſtopher of the ſaid Manor, to have and to hold to him and his Heirs for ever, to the uſe of the ſaid Chriſtopher and his Heirs, the ſaid Oliver Chudleigh then being living, after which, to wit, the 20th. day of September, 3 Eliz, the ſaid Chriſtopher had Iſſue of his body lawfully begotten, one Strechly Chudleigh his firſt Iſſue Male: And after this, to wit, the 30. day of March, 5 Eliz. the ſaid Chriſtopher had Iſſue of his body lawfully begotten, one John Chudleigh his ſecond Iſſue Male, after which, to wit, the firſt day of July, 6 Eliz. the ſaid Chriſtopher by his Deed indented of the ſame date, and inrolled within ſix months, according to the Statute bargained and ſold the ſaid Manor to Sir John Chicheſter Knight, and to his Heirs, and in the interim alſo between the date of this Deed, and in the inrolement thereof, to wit, the 6th. day of July, in the ſame 6th. year, by his Deed of the ſame date, the ſaid Chriſtopher enfeoffed the ſaid Sir John Chicheſter and his Heirs of the ſaid Manor, and by the ſame Deed warranted it for him and his Heirs,

to

to the ſaid Sir John Chicheſter and his Heirs, whereupon the ſaid Sir John Chicheſter entred into the ſaid Manor, after which, to wit, the firſt day of October, 12 Eliz. the ſaid Chriſtopher died, after which the 7th. day of November, 13 Eliz. the ſaid Stretchley Chudleigh died without Iſſue of his body: And after the death of the ſaid Sir Richard Chudleigh, to wit, the 6th. day of September, 7 Eliz. the ſaid Sir John Chicheſter enfeoffed one Philip Chicheſter and his Heirs of the ſaid Mannor, to the uſe of the ſaid Philip and his Heirs.

And the ſaid Cloſe being Copyhold and Cuſtomary Land of the ſaid Mannor demiſable by the Lord of the ſame Mannor, or his Steward, for the time being, for life or lives by Copy of Court-roll, according to the cuſtom of the ſaid Mannor.

The ſaid Philip at a Court holden at the ſaid Mannor, for the ſaid Mannor, the 8th. day of December, 15 Eliz. by Copy of Court-roll granted the ſaid Cloſe to the ſaid John Frain, for Term of his life, according to the cuſtom of the ſaid Mannor, after which, to wit, the 11th. day of March, 28 Eliz. the ſaid John Chudleigh being now Heir to the ſaid Chriſtopher, enfeoffed the ſaid William Dillon of the ſaid Mannor, to have and to hold to him and his Heirs, to the uſe of the ſaid William and his Heirs for ever, whereby he entred, and was ſeiſed, untill the ſaid John Fraine entred into the ſaid Cloſe upon him, the 8th. day of February, 30 Eliz. upon which entry of the ſaid Fraine this Action is brought.

And for difficulty of the caſe it was adjourned into the Exchequer Chamber before all the Juſtices and Barons of the Exchequer; And there it was agreed by all, that a Warranty deſcending upon an Infant ſhall not bind him, in caſe that the entry of the Infant be lawfull into the Land, to which the Warranty is united: But the Infant ought in ſuch a caſe to look well that he do not ſuffer a deſcent of the Land after his full age, before he hath made his re-entry for then the Warranty, when he is to have an Action for the Land, ſhall bind him.

And they agreed alſo that a Copyhold granted by a Diſſeiſor, or any other who hath the Mannor of which it is parcel by wrong, ſhall be avoided by the Diſſeiſee, or any other who hath right to the Mannor by his entry or recovery of the Mannor.

And ſo by Popham it was agreed by the Juſtices in the caſe of the Mannor of Haſſelbury Brian, in the County of Dorſet, between Henry late Earl of Arundell, and Henry late Earl of Northumberland: but then he ſaid, that it was agreed, that admittance upon ſurrenders of Copyholders in Fee, to the uſe of another, or if an Heir in caſe of a Deſcent of a Copyhold were good, being made by a Diſſeiſor of a Mannor, or any other who hath it by Tort, becauſe theſe are acts of neceſſity, and for the benefit of a ſtranger, to wit, of him who is to have the Land by the ſurrender, or of the Heir: And alſo Grants made by Copy by the Feoffee, upon condition of a Mannor, before the Condition broken, are good, becauſe he was lawfull Dominus pro tempore.

And for the matter upon the Statute of 27 H. 8. what ſhall become of this future uſe limited to the firſt, ſecond, and other Iſſues Males not in Eſſe at the time of the Feoffment.

Uſe, what it is.

Ewens, Owen, Bateman, and Fennor ſaid, That an Uſe at Common Law is no other then a confidence which one perſon puts in another, for a confidence cannot be in Land, or other dead thing, but ought alwaies to be in ſuch a thing which hath underſtanding of the truſt put in him, which cannot be no other then ſuch a one who hath reaſon and underſtanding to perform what the other hath committed to him, which confidence ſhall bind but in privity, and yet the confidence is in reſpect of the Land, but every one who hath the Land is not bound to the confidence, but in privity ſhall be ſaid to be in the

Heir

Heir, and the Feoffee who hath knowledge of the confidence, and in him who cometh to the Land by Feoffment without conſideration, albeit he hath no knowledge therof, and yet every Feoffee is not bound although he hath knowledge of the confidence, as an Alien Perſon, Attaint, and the like, nor the King, he ſhall not be ſeiſed to anothers uſe, becauſe he is not compellable to perform the confidence; nor a Corporation, becauſe it is a dead body, although it conſiſt of naturall perſons: and in this dead body a confidence cannot be put, but in bodies naturall.

And this was the Common Law before the Statute of 27 H. 8. Then the Letter of the Statute is not to execute any Uſe before that it happeth to be an Uſe in Eſſe; for the words are, Where any perſon is ſeiſed to the uſe of any other perſon, that in ſuch a caſe, he who hath the Uſe ſhall have the ſame Eſtate in the Land which he had before in the Uſe; Ergo, by the very letter of the Law he ought to have an Eſtate in the Uſe, and there ought to be a perſon to have the Uſe before the Statute intends to execute any poſſeſſion to the Uſe, for the words are expreſſe, that in every ſuch caſe he ſhall have it, therfore not another: And therfore the Statute had purpoſe to execute the Uſes in poſſeſſion, Reverſion, or Remainder, preſently upon the conveyance made to the Uſes: But for the future Uſes which were to be raiſed at a time to come upon any contingent, as to the Infants here, not being then born, the Statute never intended to execute ſuch Uſes untill they happen to have their beeing, and in the mean time to leave them as they were at Common Law, without medling with, or altering of them in any manner untill this time, and if before this time, the root out of which theſe contingent Uſes ought to ſpring be defeated, the Uſe for this is utterly deſtroyed, and ſhall never afterwards have his being: as here by the Feoffment made by the ſaid Sir John Saintleger and his Co-feoffees, who then were but as Tenements pur auter vie, to wit, for the life of Chriſtopher, and which was a forfeiture of their Eſtate, and for which Oliver Chudleigh might have entred, it being before that the ſaid Strechley or John Chudleigh were born, the privity of them from Eſtate being the root out of which this future uſe ought to have riſen is gone and deſtroyed, and therfore the Contingent Uſes utterly therby overthrown.

As if before the Statute of 27 H.8. Tenant for life had been, the remainder over in Fee to an Uſe: If the Tenant for life had made a Feoffment in Fee, and he in the Remainder had releaſed to the Feoffee, the Uſe had been gone for ever, ſo in all theſe caſes of contingent Uſes at this day, for he who cometh to the poſſeſſion of Land by Diſſeiſin, or wrong done to the Poſſeſſor, who is ſeiſed to anothers uſe, ſhall never be ſeiſed to anothers uſe.

And the caſe being ſo, that it is out of the letter of the Statute to execute ſuch contingent Uſes, it is more ſtrong for them out of the meaning of the Statute to execute, then before they happen to be in Eſſe: for this ſhall be to make all miſchiefs comprehended in the Preamble of this Statute, and againſt which the Statute intended to provide ſufficient remedy in a worſe miſchief then they were before the making of the ſame Statute, and this ſhall be but a perverſe inſtruction of the Statute.

And they ſaid, that the ſubtleties uſed from time to time by means of thoſe Uſes, to the great deceit and trouble of the people, were the cauſe of the making of this Statute, 27 H.8. and by all the Statutes formerly made touching Uſes, it appeareth that they were all taken to be grounded upon fraudulent and crafty deviſes, and therfore this Law had no great purpoſe to favour them, but a Fortiorari, not to make them in worſe caſe by means of the Statute then they were before, and therfore it ſhall not be taken that the Uſe is executed by the Statute, which ſtands upon a contingency, of which a greater miſchief will enſue, then there was in ſuch a caſe before the Statute, and therfore by the Feoffment made in the interim, before the birth of the Infants,

ſants, which otherwiſe ought to have preſerved the Uſe, this Uſe was utterly deſtroyed; and although the Feoffee of Chriſtopher had notice of the Uſe, yet this doth not now help in the caſe, becauſe the Feoffment did wrong to the Eſtate firſt ſetled, which was ſubject to the Uſe, and extinct in the ſame poſſibility which had been otherwiſe in the Feoffees to have given livelyhood to the ſaid Contingent Uſe: And therfore the Judgment by them ought to be, that the Plaintiff ſhall be barred.

Walmſley, That the great miſchief which was at Common Law upon theſe Feoffments to Uſes, was, that none could know upon the occupation of the Land, who was true Owner of the Land, for Ceſtuy que Uſe was the Perſon of the Profits, but in whom the Freehold or Inheritance of the Land was, there were not many which knew, wherby great miſchief came to the aſſurances which men had of Land which they purchaſed, and by it men knew not againſt whom to bring their Actions to recover their Rights, and by it Wives loſt their Dowers, Husbands their Tenancy by the Curteſie, Lords their Eſcheats, Wardſhips, and the like.

And this miſchief hapned by reaſon that one had the profit, and another the eſtate of the Land: And the Statute was made to put the Land and the Eſtate quite out of the Feoffee, who before did not meddle with the Land to Ceſtuy que Uſe, who before had but the occupation and profits of the Land, and to this intent the letter of the Law ſerves very well, which ſayes that the Eſtate of the Feoffee ſhall be clearly in Ceſtuy que Uſe, and therfore nothing by the intent and letter of the Law is now to remain in the Feoffee, no more then a Scintilla juris nemor'd in Brents Caſe in my Lord Dyer. Eliz. and the whole Eſtate in the interim untill the contingent happen ſhall be in them who have their Uſes in Eſſe, and when the Contingent happen, the Statute gives place to this Contingent Uſe, and by the execution therof comes between the Eſtates before executed, and as out of theſe by the Statute, but nothing is now after the Statute in the Feoffees, for the purpoſe of the Statute, was (as I have ſaid) to take away all from the Feoffee, for all was deveſted from him, becauſe that betwixt the Feoffor, & the Feoffee was all the fraud before the Statute, and the very letter of the Statute is to extinguiſh and extirpate the aſſurances fraudulently made, which was alwaies by reaſon of aſſurances made between the Eſtate of the Land in one, and the poſſeſſion therof in another, and to cauſe that now that the Eſtate ſhall be to the uſe, where the occupation was before: And this Statute was not made to extinguiſh or diſcredit Uſes, but to advance them, as by bringing the very Eſtate in poſſeſſion to the Uſe, and by it the truſt now taken from all others who were truſted with it before, ſo the Statute doth not condemn the uſes, but the fraud which was by reaſon of them before. And the Statute being, that the Eſtate, Right, and Title of the Feoffees ſhall go to the uſes, therfore nothing remaineth in the Feoffees, but all by authority of Parliament adjudged to be in Ceſtuy que uſe, which is the higheſt Judgment that can be given in any Court, and the words (Stand and be ſeiſed at any time) refer as well to the future, as preſent uſes, and the Statute intended as well to help the uſes which ſhall be upon any Contingent, as thoſe which are at preſent, for a future or contingent Uſe is to be ſaid an Uſe, according to its nature or quality, and it ſhall be executed according to its quality when it happen. And the words are, that the Eſtate which was in the Feoffee ſhall be in Ceſtuy que uſe and not the Eſtate which is, and therfore when the uſe happeth to be in an inſtant, the Eſtate which at the firſt Livery was in the Feoffee, to this uſe ſhall now be executed in poſſeſſion to this contingent uſe, albeit it ſelf was altogether executed (as I ſaid before) in the Uſes which were in Eſſe, and if ſo, it followeth that nothing which is done in the mean time by the Feoffee or can be done by any other, can prejudice or hurt the execution of this Uſe in contingency when the contingency happen.

And for the caſe of Brook, 30 H.8. it is plain in point, which is this.

A Covenant with B. that if B. enfeoff him of three acres of Land in D. that then the ſaid A. and his Heirs, and all others ſeiſed of ſuch Lands ſhall ſtand therof ſeiſed to the uſe of the ſaid B. and his Heirs, after which A. enfeoffed a ſtranger of this Land, after which B. enfeoffed the ſaid A. of the ſaid three acres, now the uſe ſhall be to the ſaid B. and his Heirs of the ſaid other Land, for the Statute ſo binds the Land to this Contingency when it happens, that by no means it can be defeated, and this is the cauſe that Leaſes made by force of Proviſoes compriſed in aſſurances are good, and cannot be avoided, for the Intereſts to theſe Leaſes is wrought by the firſt Livery and the Statute, and therfore upon the matter, I conceive, that Judgment ought to be given for the Plaintiff.

Gawdy conceived that it is executed by the intent, but not by the letter of the Statute, for the purpoſe was to remove all the Eſtate from the Feoffee, and to put it in Ceſtuy que uſe wholly, to wit, in poſſeſſions, to the Uſes which were in Eſſe, and in alevance as to the Uſes which were to come and contingent; and now by the ſame Statute the contingency of the poſſeſſion ſhal go in licence of the contingent Uſe, and now an Uſe limited to one for life, with Remainder over to the Heirs of the body of I. S. or to the firſt Son of I.S. ſhall be in the ſame manner as if Land at this day had been letten to one for life, with Remainder over to the Heirs of the body of I. S. or to the firſt Son of I.S. and not otherwiſe, for the quality which he had in the Uſe, the ſame (by the very letter of the Statute) he ſhall now have in the poſſeſſion and Eſtate of the Land, and the Statute is not to undo any Uſe, but to tranſfer an Eſtate in the Land to the Uſe.

But he ſaid, That by the Feoffment made to Chriſtopher, the Contingent remainder which was deveſted in Stretchly and John Chudleigh depending upon the Eſtate which Sir John Saintleger and his Co-feoffees had for the life of Chriſtopher, is utterly gone and deſtroyed in the ſame manner, as where a Leaſe is made for life, the remainder to the right Heirs of J. S. or to the Heirs of the body of J. S. if the Tenant for life dies, or aliens, whereby he makes a forfeiture, and determines his Eſtate in the life of the ſaid J. S. his Heir ſhall never have the Land by the remainder afterwards, becauſe he was not in Eſſe, as an Heir at the time when the Eſtate ended, for there cannot be a remainder without a particular Eſtate, neither can it ſtand or be preſerved.

And as in this caſe without a particular Eſtate of Free-hold, a Remainder cannot be, no more in the caſe now in queſtion, being now become by means of the Statute, as if it had been an Eſtate executed in poſſeſſion; and for this cauſe only he conceived, that Judgment ought to be given againſt the Plaintiff.

And Clench agreed with this opinion in all, and both of them agreed, if there be none to take the Uſe according to the limitation at the time, when it falleth to be in Poſſeſſions, that he ſhall never take it, although it happen to be in Eſſe afterwards.

Clark ſaid, that Uſes were not at Common Law, but grew by ſufferance of time, as appeareth by the words of the Statute it ſelf, and the miſchief and ſubtlety which was before this Statute was not in the Fine, Feoffment, or other Aſſurances of Land, but by means of the Uſes limitted therupon, contrary to that which was uſed in the ancient courſe of the Common Law,, and the Statute was made to reduce the Common Law to its ancient force and courſe, and therfore ought to conceive ſuch a conſtruction, as may agree with the purpoſe of the makers of the Statute, and therfore the beſt conſtruction of this Statute is, not to execute other manner of Uſes, but in ſome caſes to extinguiſh them, as where it is ſuch, as will make the caſe in as ill, or worſe condition then it was before the making of the Statute.

It

It hath been agreed by all, that the Statute doth not execute any Uſe which was ſuſpended at the time of the making of the Statute, as by reaſon of a Diſſeiſor, or the like hapning before; and if it doth not execute the Uſe which is in ſuſpence for the right which he had in the Uſe, how can it execute the Uſe which hath not any being? for in ſuch caſes, of Infants not born as here, untill they be in Rerum natura, the Uſe cannot have any being.

And in the ſame manner in all caſes where the Uſe is not to riſe but upon a future contingent: And what good ſhall this Statute do, if theſe leaping Uſes ſhall ariſe without being impeached? Nothing, but alwaies nouriſh a Viper in the boſom of the Law, which is quite againſt the intent of the makers of the Statute.

The Law was made to preſerve peace amongſt the Subjects, and to aſſure their Poſſeſſions, as many other Statutes did, that were made about this time, as the Statutes of Fines, Wills, and others. But if the expoſition of this Statute ſhall be as the other ſide hath taken it, it will make the confuſion which will happen therupon intollerable, and much worſe then it was before the Statute was made and (as Walſh ſaid) if no aſſurance can be made to be forcible againſt ſuch a contingent Uſe, this will make it worſe then it was before.

And he ſaid, that it was not to be compared to the intereſt of Lands to begin at a time to come, nor to the caſe where a man deviſe that his Land ſhal be ſold, in which caſe, he ſhall not be impeached by any manner of aſſurance, to be made in the mean time by the Heir, and the reaſon is, becauſe the Vendee takes by the Will under the Eſtate of the Heir, and not by the ſale, and therfore upon the matter, he conceived that the Plaintiff ought to be barred.

Periam ſaid, that Uſes were at Common Law, and to prove it, he vouched 24 H.8. abridged in Brook. And he ſaid, that there have been alwaies truſts, Ergo, Uſes ab initio, but they had not ſuch eſtimation at the beginning as they have had by continuance of time, and ſo it was of Copyholds: And theſe Uſes at Common Law bind but in privity according to the truſt, but do not bind in the poſſeſſion of him who cometh to the Land in the Poſt: But now by the Statute all truſts are gone, and the Eſtate of the Land it ſelf transferred to the Uſe, and now the Uſe guides the Land, and not the Land the Uſe.

And the Statute did not intend to deſtroy any Uſe, but to bring it back to the Poſſeſſion, according to the courſe of the common Law, and to avoid the fraud.

And as before the Statute the Uſe it ſelf in ſuch a caſe of Contingency was in obeyance for the time, ſo now the Eſtate it ſelf is in obeyance by the Statute, which wills, that he ſhall now have an Eſtate in the Land it ſelf, of ſuch a quality as he had before in the Uſe; for the Statute puts all cleerly out of the Feoffees, and it is not inconvenient to have a Poſſeſſion ſo to a Contingent Uſe, and if it had not been in the words of the Statute, yet (as hath been ſayd) it ſhall be ſo taken by the intent of the Statute; for it never was the intent of the makers of the Statute to do wrong to any by means of the Statute. And therfore he put the caſe of Cranmer, who made a Feoffment to the uſe of himſelf for his life, and after his deceaſe to the uſe of his Executors for years, this Eſtate for years is not now veſted in any, becauſe a man cannot have an Executor during his life, and yet it remains as in the cuſtody of the Law, untill there are Executors to take it.

And he ſaid, that the caſe of the Lady Wray was as ſtrong to prove the caſe in queſtion, to be, as he takes it, which cannot be anſwered, for if ſhe had married with the Lord Wray by the aſſent of the Councell aſſigned for it, according to the agreement, ſhe had taken an Eſtate by the Contingency, but in as much as ſhe did not do it, it was otherwiſe.

And we are to conſider well, what we do in this caſe, it is a Tree, the branches wherof over-ſhadow all the Poſſeſſions of the Realm in effect, for the

the Eſtates and Leaſes in manner of all ſtand upon thoſe aſſurances to Uſes, and to pull up ſuch a Tree by the roots, is to put all the Realm in a confuſion, and therfore if there be any miſchief therin, it is better to help it by Parliament, then to alter it by Judgment. And ſo upon the whole matter, I conceive that Judgment ought to be given for the Plaintiff.

Anderſon, That an Uſe was not at Common Law, for the Common Law had no reſpect to it, but to the Feoffee, and it was the perſon who by the Law had any thing to do in the Land, and not Ceſtay que Uſe, for he might puniſh Ceſtay que Uſe for his medling with the Land, and Ceſtay que Uſe had no remedy againſt him by no means; But by Subœpna in the Court of Conſcience.

And further, an Uſe being limited to another in Fee, no Uſe can be limited further therupon for any Eſtate. And it hath been well ſayd, that the letter of the Statute of 27 H. 8. did not tend to execute this Uſe which was not in Eſſe, and for the intent therof, that it did not tend to execute any contingent Uſe untill that it happen, which is proved by the caſe, that an Eſtate for years being aſſigned over, or granted to an Uſe, the Uſe of this is not executed by the Statute of 27 H. 8. as it was agreed about 27 Eliz. and what was the reaſon in the caſe, but becauſe there was not any Seiſin in the Uſe, but only a poſſeſſion to the Uſe? wherby the words of the Statute are much to be regarded. And here how can there be a Seiſin to the Uſe which is not? it cannot be, and therfore for the like reaſon, as in the other caſe it is never executed, nor ſhall be removed by means of ſuch an Uſe, untill it happeneth to be an Uſe in Eſſe.

And for Brents Caſe, I have alwaies taken the better opinion to be, that the Wife cannot take in the caſe for the mean diſturbance, notwithſtanding the Judgment which is entred therupon, which was by aſſent of the parties and given only upon a default made after an Adjournment upon the Demurrer, for he ſaid, that he had viewed the Roll therof on purpoſe; and if it be, that ſuch a Contingent Uſe be not executed untill it happeneth to be in Eſſe, here it appeareth, that by the Feoffment Chriſtopher is in, of another Eſtate which was not ſubject to the Uſe, becauſe he is in by forfeiture and wrong made to this Eſtate, and therfore not bound to the Uſe in Contingency, although he made it without conſideration, and although he had notice of this contingent Uſe, and therfore this contingent Uſe utterly defeated before it had any being.

But in all the Caſes put on the other ſide, it doth not appear that there was any thing done in diſturbance of theſe mediate uſes before they happned, and therfore not to be compared to this caſe, wherby he conceived that the Plaintiff ought to be barred.

Popham ſaid, That in as much as the manner of aſſurance made by Sir Richard Chudleigh may ſeem ſtrange, and in ſome manner to touch the reputation of the ſaid Sir Richard (who was a grave and honeſt Gentleman) to thoſe who heare it, and do not know the reaſon why he did it, which I remember to be this as I have heard, to wit, That the ſaid Chriſtopher had killed one Buller a Gentleman of good reputation, wherupon he fled into France, and the ſaid Sir Richard doubting what would become of his Eſtate, if he ſhould dye before he had ſetled his Land, and yet having a deſire to have power to undo the aſſurance which he purpoſed to make, if he pleaſed, his Councell then thought the beſt way to make and deviſe the aſſurance, ſo, that ſuch an Eſtate of Inheritance might therby be in him which could not deſcend to the ſaid Chriſtopher, and yet ſuch, that he might therby undo the aſſurance made by the Recovery when he pleaſed, and yet ſuch alſo as ſhould never take effect in any of the Iſſues of his other Wives, to the prejudice of his right Wives, becauſe he never had a purpoſe to marry with any of theſe Wives.

And to that which hath been touched by Perium, That this Limitation firſt made is a Fee-ſimple in Sir *Richard*, I conceive cleerly the contrary. For if it ſhould be ſo, then no Uſe could be limited ouec upon this Fee-ſimple, as hath beenſaid before, and therfore all the remainder of the Caſe had been to no end; but he ſaid, that it was an Eſtate-tail ſpeciall in Sir Richard, and denied the opinion of Ayſcough taken ſo in 20 H. 6. and this by reaſon of the Statute de Donis conditionalibus, which wills Quod voluntas donatoris ſecundum formam doni in charta doni manifeſte expreſſam de cætero obſervetur. And here it is expreſſe, that the Heirs of Sir Richard begotten upon any of theſaid Wives ſhall have the Land, and therby it ſhall be underſtood that his Heirs ſhall be intended by common intendment the Heirs by him. To which opinion Anderſon agreed.

And for the matter, Popham conceived cleerly that there was not any ſuch uſe at Common Law as we commonly call an uſe, and yet he acknowledged there were alwaies truſts at Common Law; but every truſt is not to be ſaid an uſe: for none will doubt but that a truſt may be, and is many times put in others at this day, as upon purchaſes made in other mens names, and aſſurances alſo upon truſt, and yet we will not ſay that this is an uſe, and without doubt ſuch truſts were at Common Law, but not the uſes aforeſaid, and the reaſon that moved him to take the Law to be ſo, was, that he had not ſeen any ancient record, Statute, or Book of Law, nor any writing before the time of Ed. 3. which made any mention of this word uſe; and if it had been at Common Law, without doubt (as they ſaid) ſome mention would have been made therof. The reaſons which are alledged in 27. H. 8. and in the caſe vouched 24. H. 8. that a truſt was at Common Law is, by the one of them the Cauſa Matrimonii prolocuti, which (as they pretend) ought to prove that there was a truſt at Common Law.

And the other the Statute of *Marlbridge*, that the Lord in caſe of Wards againſt Feoffments made by Colluſion, which Feoffments (they alledge) prove that a truſt then was.

To which it was ſaid, that the gift made by a woman to another, to the intent that he ſhal marry her, hath in it a Condition more properly implied, to wit, that if he doe not marry her, that ſhe ſhall have her land back againe, for which the Common Law gives her remedy by the Action aforeſaid, for if it had been but a truſt, no remedy had been by the Common Law.

And for the Statute of Marlbridge the contrary therunto is manifeſtly proved, for the Statute ſpeaks but of Feoffments made to Heirs apparants or upon Condition, or to the intent to enffeoff the Heir at his full age, or the like, in which caſes the uſe alwayes goes with the Poſſeſſions, and is not to the Feffor: And the Statute of 4. H. 7. was made in vaine, which gives the Wardſhip of Ceſtuy que uſe where no Will is declared, which had not been needfull if Feoffments within the Statute of Marlbridge had been ſaid to have been to Uſes.

And without doubt if thoſe who made the Statute of *Marlbridge* had then had knowledge of theſe Feoffments to Uſes which were ſo miſchievous, and more then the other Feoffments by Colluſion, they then would have provided remedy for theſe caſes of Uſes.

Alſo the Statute *de Religioſis* ordains that *Nec arte, nec ingenio*, Lands ſhal not be conveyed in *Mortmain*, and therby it was conceived that a full proviſion had been made againſt theſe *Mortmains*, and yet in 15 *Rich.* 2. Proviſion was made againſt Uſes conveyed in *Mortmain* to Religious or other Corporations of which they took the Profits.

And without doubt thoſe who were ſo preciſe in the making of the Statute of Religioſis againſt Mortmains, would alſo have made proviſion for the uſes if they had then been known.

But to cleer this point, without all controverſie the Statute it ſelf of uſes, 27 H.8. makes it plain, which ſaith expreſly that by the Common Law of the Realm, Lands or Tenements ought not to paſſe from one to another, without ſolemn Livery, matter of Record, or writing, and that theſe Feoffments to uſes were Errors uſed and accuſtomed within the Realm, to the Subverſion of the ancient Laws; therefore it ſtands not with the ancient Common Law of the Realm, as all the Parliment took it, which is more to be regarded then any Book vouched. But ſee how, and when they began and crept in at Common Law, and it ſhall be eaſily perceived (as it hath been well ſaid by ſome of thoſe who argued to this point at the beginning) that they began by two means, to wit, by fraud, and by fear. And he ſaid, that the firſt Book which he had ſeen in all the Books of the Law, which tend to an uſe, is the caſe of 8. Aſſiſe, which makes mention that the Counſee of a Fine entred into the Land in the right of another, which is to be taken to anothers uſe. And in the Quadrageſimas of Edw. 3. mention is made of the Feoffees of the Lord Burglaſh, who ſued to the King by petition, and by the Statute of 50 Ed. 3. cap. 6. mention is made that divers gave their Lands to their Friends to have the profits, and afterwards fled to priviledged places, and lived there to the hinderance of their Creditors; And therefore it was provided that in ſuch a caſe execution ſhall be made, as if no ſuch aſſurance had been made. And by 2 Rich. 2. theſe are called Feoffments to uſes, and made by craft to deceive Creditors, and there is the firſt mention which is made in any Statute of the word (Uſe:) So fraud hath been alwaies the chief foundation of theſe Uſes; yet in time they began to have ſome credit in the Law. And this was when men ſaw that the Court of Conſcience gave remedy in theſe caſes againſt ſuch who had not the conſcience themſelves to perform the truſt put in them, and to take away the danger which hapned to an infinite number of good Subjects, upon the Garboyls which hapned between the time of E. 3. and that of King H. 7. cauſed that in effect, all the Poſſeſſions of the Realm were put in Feoffments to uſes. And the firſt caſe in the Law which ſpeaks of this word (Uſe) which he ever ſaw was (as he ſaid) in 5 H. 4. And in the like caſe by Gaſcoign, 7 H. 4. no remedy is given by the Law for Ceſtuy que uſe, and afterwards it crept into the Law as appeareth, yet as an Error of long time uſed: And if before the Statute of 27 H 8. a Leaſe had been made for life, the remainder in Fee, to the uſe of B. for life, the remainder to the uſe of the firſt Son of the ſaid B. and ſo further as here:

If the Tenant for life had made a Feoffment in Fee to a ſtranger, and had not given the ſtranger notice of the Uſe, and all this were without conſideration, and afterwards he in the Remainder in Fee to the Uſe had releaſed all his Right to the ſaid ſtranger, every one of them had been hereby without remedy for their Uſes: Were the Son of B. born before or after this wrong done: So if it were at Common Law before this Statute as hath been well ſaid, and the Law being ſo before this Statute, then he ſaid it was to be ſeen what was to be done in the caſe after the Statute, which will ſtand altogether upon this, what will become of theſe contingent Uſes to the Sons not born at the time of the ſaid Feoffment made by Sir John Saintleger and his Co-feoffees, by this Statute of 27 H.8. and it ſeems to him clearly that no poſſeſſion is executed to any contingent uſe by this Statute, untill it comes in being; and that as the caſe is here and in ſome other ſpeciall caſes it ſhall never be executed: And one cauſe why ſuch a contingent Uſe ſhall not be executed, is, becauſe it doth not ſtand with the letter of the Law, but rather is againſt the letter.

Another cauſe is, becauſe it is utterly againſt the intent of the Law to

execute it, as the caſe is here. It doth not ſtand with the Letter of the Statute, for this is, Where any perſon or perſons ſtand ſeiſed to the uſe of any other perſon or perſons, &c. And it is cleer that none can ſtand ſeiſed to the uſe of him who is not, neither can he who is not in rerum natura have any uſe; therfore the caſe here doth not ſtand with the letter of the Statute to be now executed,

And further, the words following are, that in every ſuch caſe, every perſon who hath ſuch an Uſe in Fee-ſimples, Fee-tail, for life, for years, &c. or otherwiſe in Remainder or Reverſion ſhall ſtand hereafter ſeiſed and adjudged in lawfull Eſtate and Poſſeſſion of the Lands, &c. of ſuch an Eſtate as he had in the Uſe: The words then in the Statute being ſo preciſe as they ſtand, to wit, that in ſuch caſe he who hath ſuch an Uſe ſhall have the poſſeſſion executed of ſuch an Eſtate as he had in the Uſe, excludes all other who are not in it, to have it to be executed untill that they happen to be in the ſame caſe as of that which the Statute ſpeaks, And if they had intended to have the Poſſeſſion to be executed and tranſferd from the Feoffees to theſe contingent Uſes, they would have made ſome mention therof as well as they did of Reverſions and Remainders, and they did not leave there, but mention this again, to wit, that the Eſtate, Right, Title, and Poſſeſſions which was in ſuch perſon or perſons which were ſeiſed to the uſe of any ſuch perſon or perſons, ſhall be hereafter cleerly adjudged in him, or thoſe who had or have ſuch Uſe according to ſuch quality, manner, form, and condition as he had before the uſe which was in them, by which it appeareth plainly, that the Right and Poſſeſſion of the Feoffee ſhall not be veſted in or to any, untill that he hath the uſe it ſelf; for it is ſaid, that it ſhall be in him, therfore they ought to have ſomthing in the Uſe by the very expreſſe letter of the Statute, before any thing of the Poſſeſſion ſhall be executed or transferred by this Statute from the Feoffee to Ceſtuy que uſe: And how can this be ſaid to be within the letter of the Statute, which hath ſo many and ſo preciſe words and branches againſt it. And therfore it is cleer, that if the Feoffee to uſe were ſeiſed at the time of making of this Statute, that the uſe ſhall not be executed by this Statute, untill there be a regreſſe made by the Feoffee, or in his right to revive the former uſe, and it had been out of the letter of the Statute.

But to this I ſay, that how preciſe ſoever the letter is againſt the execution of theſe contingent uſes, the intent therof is yet more ſtrong & preciſe againſt them, which I will prove cleerly by the Statute it ſelf, which is of greater authority then the particular opinion or conceit of any Judge whomſoever, for it is the Judgment of all the Judges, and all the Realm alſo which ought to bind all, and to which all ought to give credit. And to take the intent, the Statute was full that it was made (as is reherſed) for the Diſinheriſon which before was to true Heirs; for the defect which before was in the aſſurance of Purchaſes, for the miſchiefs, in regard before men did not know (by reaſon of theſe Uſes) againſt whom to bring their Actions to recover their Rights. To avoid perjury that it ſhould not be ſo common as it was, by reaſon of the maintenance and ſupport of theſe ſecret Uſes, for the releif of the King & other Lords, as to their Eſcheats, Forfeitures, Wardſhips, Releaſes and the like, for the miſchief which before hapned to Tenants by the Curteſie, and in Dower, by reaſon of theſe Eſtates in Uſe; and finally for the great Inconveniencies which hapned by reaſon of them, to the great trouble and unquiet of the People: Theſe were the great miſchiefs that were before the making of the Statute, and theſe were the things for which the Statute intended to provide remedy, and if the expoſition ſhall be as hath been on the other ſide, theſe miſchiefs ſhall be on every part more miſchievous by much, then it was before the making of the Statute, and that in ſuch a a manner, that it ſhall be impoſſible to help any of them but by Parliament; whereas alwaies the good and true conſtruction of a Statute is to

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conſtrain it, ſo that it ſhall give remedy to the miſchief which was before, and not to make it more miſchievous, and therfore examine it by parts.

And as to the diſinherison of two Heirs, it appears now that by ſuch expoſition more inconveniences will ariſe, and that in a more dangerous degree then before the Statute; for before, for the Uſe the Heir had his remedy in conſcience according to the truſt, and he might have made a diſpoſition of the Land it ſelf, by the Statute of Rich. 3. as an Owner, for the advancement of his Wife, and his Children, and for payment of his debts, and the like. But as the caſe is now uſed by means of theſe perpetuities (as they are called) if the expoſition of the other ſide ſhall hold place, the true Heir ſhall not only be continually in danger to looſe his Inheritance, but by them the very bowels of nature it ſelf ſhall come to be divided, and as rent in peeces, for by reaſon of theſe the Inheritants themſelves cannot make any competent proviſion for the advancement of their Wives, Daughters, or youngeſt Sons, as every one according to the courſe of nature ought to do, nor by reaſon of this can he redeem himſelf if he were taken Priſoner: And this will make diſobedience in Children to their Parents, when they ſee that they ſhall have their Patrimony againſt their will, wherby ſuch Children oftentimes become unnaturall and diſſolute, of which I in my time have ſeen many unnaturall, dangerous, and fearfull conſequences, not convenient to be ſpoken of. And it ſtates not there, but it cauſeth mortall debate (as to blood) between Coſin, and Coſin, Brother, and Brother, and not ſo only, but between the Father himſelf and his Children, of which every one of us have ſeen the experience, for the one ought to be as a watch upon the other, to ſee when any thing happen to be done, to give him advantage to diſinherit the very true Owner.

And I ſay, that it is impoſſible that any can keep his Poſſeſſions which hath them tyed with theſe perpetuities, if the expoſition of the Statute ſhould hold place which the other ſide hath made. And I affirm preciſely, that there is not any one in England who hath had ſuch Poſſeſſions ſo bound by deſcent of Inheritance by five years of any valus, but that he hath loſt all, or part of his ſaid Land at this time, let him be never ſo preciſe in making his Aſſurances, and yet he is not ſure to have one skilfull in the Law alwaies at his elbow when he is to meddle with his Land. And therfore I put but this Caſe.

One who hath ſuch a perpetuity with power to make Leaſes, rendring the ancient Rent, or more, hath two Farms, either of them of the ancient Rent of 20 *s.* a year but the one is worth 60 *l.* a year, and the other but 20 *l.* theſe are in hand to be better together, rendring 53 *s.* 4 *d.* for both together, therfore he hath loſt all, or part of his Land, according to that of which the perpetuity is; ſo it is evident that it will happen to be more miſchievous in time to come, and therfore by this expoſition much more to the diſinheriſon of the Heir, then it was before the making of this Statute. And which is more miſchievous if a *Feme putein* happen to be in ſuch a houſe who happen to have Children in Adultery, theſe Baſtards ſhall have the Land againſt the will of the Father, to the utter diſinheriſon of the true Heirs, and againſt the intent of him who made the limitation, by which we may ſee the juſt Judgment of of God upon theſe who attempt by humane policy, to circumvent the divine providence of God for the time to come; and of this alſo I have ſeen an example.

And now to the miſchief, that men do not know againſt whom to bring their Actions to ſue for their Rights, and it is cleer, that now by ſuch an expoſition they ſhall be now in much worſe condition then they were before, for before the Action was given againſt him who received the Profits, which is now gone by this Statute in the caſes of Free-hold, and therfore if the other expoſition ſhall hold place, it is cleer that untill the Statute of 13 *Eliz.*

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men might have been by means of this Statute put out of all remedy to recover their rights by any manner of Action, as ſome put it in practice, as to make Feoffments to the uſe of the Feoffor, and his Heirs, untill any intend to bring an Action againſt him for this Land, and then over to others upon the like limitation, with a Proviſo to make it void at his pleaſure, and the like, and what miſchief ſhall then be for the time upon ſuch an expoſition? ſuch, that Juſtice therby cannot be done to the Subject; and what an abſurdity ſhall it be to ſay, that ſuch an Expoſition can ſtand with the intent of the Makers of the Law.

And to that which hath been argued on the other ſide, and firſt on that which was ſaid by Walmſley, That the Right, Eſtate, and Poſſeſſion is wholly out of the Feoffee, and veſted to the Uſes, which have their beeing by the Statute, and that upon the Contingents hapning, their Eſtates uncouple and give place to the contingent Uſe then executed, and that the execution therof ſhall be by a Poſſeſſion drawn to it out of the Poſſeſſion which was before executed by the Statute in another: I ſay, that this Statute can by no means have ſuch an expoſition; for this is as much as to ſay, that an Uſe may ariſe upon an Uſe, contrary to what is adjudged, 36 H. 8. That a Bargain and Sale by a Deed indented, and enrolled, cannot be at this day of Land to one, to the Uſe of another.

And if a man enfeoff another to the uſe of J. S. and his Heirs, and if J. N. pay ſuch a ſumm, that then the ſaid J. S. and his Heirs ſhall be ſeiſed of the ſame Land to the uſe of the ſaid J. N. and the Heirs of his body: J. N. paies the money, yet the Uſe doth not riſe out of the Poſſeſſion of the ſaid J. S. But if it had been, that upon the payment the firſt Feoffee and his Heirs ſhall ſtand ſeiſed to the uſe of the ſaid J. N. and the Heirs of his body, it ſhall be otherwiſe; therfore ſomthing remains to the firſt Feoffee in the Judgment of the Law.

And I remember, that when I was a Counſellor at Law in the time of the Lord Dyer, where a Feoffment was made to the Uſe of one for life, with Remainders over, with reſtraint to alien, and with power given to Tenant for life to make Leaſes for one and twenty years, or three lives, it was much doubted whether this power ſo limited to him without words in the Aſſurance that the Feoffee and his Heirs ſhall ſtand ſeiſed to theſe Uſes, ſhall be good to make ſuch Leaſes, or not? And therfore ſuppoſe that a man bargains and ſells Land to one for his life by Deed indented and inrolled, and make therin a Proviſo, that the Tenant for life may make ſuch Leaſes, this is to no purpoſe as to power to make a Leaſe, but the ſtrongeſt caſe which he put was, that of 30 H. 8. which I agreed to be Law, as it is there put, whether it were before or after the Statute of 27 H. 8. for it is not there put that the Feoffment was made upon any conſideration to the ſtranger, in which caſe, although he had no notice of the firſt Covenant, yet in ſuch a caſe he ſhall take the Poſſeſſion ſubject to the Uſe, to which it was bound by the preſent Covenant: But if you conſider the caſe well, you ſhall ſee that it was a caſe before the Statute, for it followeth preſently in the ſame caſe, that it is there ſaid, that it is not like the caſe where the Feoffees in Uſe ſell the Land to one who hath no notice of the firſt Uſe, wherby it appeareth that it was a caſe before the Statute, for otherwiſe there had been no cauſe to have ſpoken then of the Feoffees to an Uſe, and by the ſame it appeareth, if the Covenantor had bargained and ſold the Land to another, the ſame Uſe had never riſen upon the Covenant, and therfore it is cleer againſt the Law, that the Poſſeſſion ſhall be bound with ſuch an Uſe in whoſoevers hand it comes.

And to that which Periam ſaid, in the caſe of theſe Contingent Uſes, they ſhall now by the Statute be in the ſame degree, as if Land it ſelf had been ſo conveyed; and that now the Land ſhall be in Contingency in ſtead of the Uſe, and that by ſuch manner it ſhall be executed, and that by ſuch means

altis utterly out of the Feoffees, becauſe the Statute was made to determine all matter of truſt to be hereafter repoſed in any Feoffee: this is well ſpoken, but not well proved; for as I have ſaid before, it is an expoſition quite contrary to the letter and intention of the Law. And I agree, as hath been ſaid, if there be none to take the Uſe at the time that it falleth to be in poſſeſſion, according to the limitation that he ſhall never take it afterwards, no more of an Uſe upon the Statute than of an Uſe at Common Law: As if an Uſe be limitted for life, the remainder to the right Heirs of *I. S.* if the Eſtate for life be determined in the life of *I. S.* the remainder ſhall never veſt afterwards in the right Heirs of *I. S.* no more than if an Eſtate had been ſo made: But this makes for me, to wit, that the Eſtate upon the Uſes executed by the Statute, ſhall be of the ſame condition as Eſtates in poſſeſſion were at Common Law, and that they being executed ought alſo to be ſuch, of which the Common Law makes allowance.

And by way of argument, I agree for the time that it is, as hath been ſaid by them who maintain that an Uſe may be in ſuſpence, as to that which is an Uſe in its proper nature, for it is not properly ſaid an Uſe, untill that it be ſaid in Eſſe, to take the Profits themſelves: But I am to turn this Argument againſt him who made it, for if it be ſo, the Uſe can never be in ſuſpence, and if ſo, it follows that no Poſſeſſion by means of any ſuch Uſe can be in ſuſpence, but ſtaies where it was before to be executed when the Uſe happens to be in being.

But as to that, that a Reverſion or Remainder may be of that which we call an Uſe, ſo alſo may ſuch a Uſe be in ſuſpence in the ſame manner as the Poſſeſſion it ſelf, but not otherwiſe.

And as to Cramners Caſe formerly put, the Law is ſo, becauſe nothing appeareth in the caſe to be done, to the diſturbance of this contingent Uſe in the interim before it happen. But upon the Caſe put of the Lady Bray, upon which it hath been ſo ſtrongly relied, it was thus.

The Lord *Bray* made an aſſurance of certain Lands, to the uſe of certain of his Councell, untill the Son of the ſaid Lord *Bray* ſhould come to the age of 21. years, for the livelyhood of the ſaid Son, and of ſuch a Wife as he ſhall marry with the aſſent of the ſaid Councell, and then to the uſe of the ſaid Son and of the ſaid Wife, and of the Heirs of the body of the ſaid Son: The Father dies, the Son was become in Ward to the King, after which one of the ſaid Councellors dies, the King grants over the Wardſhip of the ſaid Son, after which the ſaid Lord *Bray* by the aſſent of his Guardian, and of the ſurviving Councellors marries the Daughter of the then Earl of *Shrewsbury*, after which the Husband aliens the ſame Land to one *Butler*, and dies, and upon Action brought by the ſaid Lady againſt the ſaid *Butler* for the ſame land, ſhe was barred by Judgment, and upon what reaſon? becauſe ſhe was not a perſon known when the Statute was made, which muſt be in every caſe of a Freehold in Demeſne, as well in caſe of an Uſe, as in caſe of a Poſſeſſion.

And therefore a Leaſe for years, the Remainder to the Heirs of *I. S.* then living, is not good, and the ſame Law of an Uſe. And ſo it was agreed by all the Juſtices very lately in the caſe of the Earl of Bedford, but in theſe Caſes it remaineth to the Feoffor; and becauſe it doth not appear at the time of the aſſurance who ſhall be the Wife of the ſaid Son, ſo that there was not any to take the preſent Free-hold by name of the Wife of the Son, ſhe takes nothing by the aſſurance, but this reaſon makes for our ſide: to wit, That if there were none to take the Free-hold in Demeſne from the Uſe, when it falleth, he ſhall never take it,

The other reaſon in this Caſe was, becauſe ſhe was not married by the conſent of all the Counſellors, for that one was dead, nor according to the power given by the agreement, but by the authority of the Guardian, that the power which the Father had upon his Son was ceaſed.

And

And Nota, That by a Diſſeiſin the contingent Uſe may be diſturbed of his Execution; but there by the entrette of the Feoffor only before when the Contingent happen it may be reuived to be executed. But by the Deade of the Feoffee or his Heirs, the Contingent in ſuch a caſe by Poſtnatt is barred of all poſſibility at any time to be executed.

And to that which hath been ſaid, That the generall and unibertall Aſſurances of men throughout all the Realm at this preſent by means of Uſes, and that it ſhall be a great deal of danger and inconvenience to make them now in queſtion or doubt, and that it ſhall trouble upon all the poſſeſſions of the Realm, and therfore it ſhall be too dangerous to pull up ſuch Trees by the roots, the Branches wherof are ſuch and ſo long ſpread, that they overſhadow the whole Realm.

Popham ſaid, That they were not utterly againſt Uſes, but only againſt thoſe, and this part of them which will not ſtand with the publike Weal of of the Realm. and which being executed ſhall make ſuch an Eſtate which cannot ſtand with Common Law of the Realm, or the true purport of the Statute; and therfore he ſaid, that it was but to prune and cut off the rotten and corrupt branches of this Tree, to wit, that thoſe which had not their ſubſtance from the true Sap, nor from the ancient Law of the Realm, nor from the meaning of the Statute, and ſo to reduce the Tree to its beauty and perfection.

The ſame reaſon he ſaid, might have been made in the time of Edw. 4. againſt thoſe Arguments which were made to maintain the common Recoveries to bar Eſtates-tail. But if ſuch a reaſon had been then made, it would have been taken for a bare conceit and meer trifle, and yet Uſes were never more common then Eſtates-tail were between the Statute of Donis conditionalibus, and the ſaid time of Edw. 4. But the grave Judges then ſaw what great trouble hapned amongſt the people by means of Intails, and what inſecurity happened by means therof to true Purchaſors, for whoſe ſecurity nothing was before found (as we may ſee by our Books) but collaterall Warranty, or infinite delay by Voucher; and thus did the Judges of this time look moſt deeply into it, wherupon, upon the very rules of Law it was found that by common Recovery with Vouchers theſe Eſtates-tail might be barred, which hath been great cauſe of much quiet in the Land untill this day, that now it begins to be ſo much troubled with the caſes of Uſes, for which it is alſo neceſſary to provide a lawfull remedy.

But he ſaid plainly. That if the Expoſition made on the other ſide ſhall take place, it will bring in with it ſo many miſchiefs and inconveniencies to the univerſall diſquiet of the Realm, that it will caſt the whole Common-wealth into a Sea of troubles, and endanger it with utter confuſion and drowning.

And to that which was ſaid, That a Remainder to the right Heirs of J. S. or to the Heirs of the body of J. S. or to the firſt Son, as here are, ſo in the cuſtody of the Law that they cannot be drawn out, & that therfore no forfeiture can be made by the Feoffment made by him who hath the particular Eſtate.

To that he ſaid, That a Diſſeiſin made to the particular Eſtate for life, draws out ſuch Remainders to the right Heirs, as is proved expreſly by 3 H. 6 where it is holden, that a collaterall Warranty bars ſuch a Remainder in obeyance after a diſſeiſin.

And by Gaſcoigne, 7 H. 4. If ſuch a Tenant for life makes a Feoffment in Fee, it is a Forfeiture, but he conceived that in the life time of *I. S.* none can enter for it, but this is not Law; and when by the Feoffment the particular Eſtate is quite gone in poſſeſſion, and in right alſo, the remainder ſhall never take effect, by the very rules of Littleton.

And by 27 H. 7. which is, That a Remainder cannot be, unleſſe there be an Eſtate upon which it may have dependency, which there it cannot; but in the caſe of a Diſſeiſin made to a particular Eſtate, it is otherwiſe, becauſe there the Eſtate

Eſtate remains in right. And to ſay that it ſhall not be a Forfeiture, becauſe the Feoffment was made to Chriſtopher, who then had the Fee-ſimple which was limited to the right Heirs of Sir Richard Chudleigh, this is not ſo, for by 41 *E.*3. The Tenant for life himſelf, who alſo had a Remainder in Fee-ſimple in himſelf, depending upon a mean Eſtate-tail in another made a Feoffment, and by it committed a Forfeiture to him in the Remainder in tail.

But if Tenant for life, Remainder in tail, Remainder in Fee, enfeoff him in the Remainder in tail, this is a Surrender of his Eſtate for the immediate Eſtate which was in him; wherupon this Term, Judgment was given in the Kings Bench for *Fraine* the Defendant, againſt Dillon who was Plaintiff. And it is entred, *Hill.*31 *Eliz.Rot.*65.

Baynes *Caſe.*

10. AT the Seſſions holden at Newgate preſently after this Term the caſe was this; one Baines with another came in the night time to a Tavern in London to drink, and after they had drunk, the ſaid Baynes ſtole a cup in which they drunk in a Chamber of the ſame Houſe; the Owner of the ſaid Houſe, his Wife, and ſervants then being alſo in the Houſe, and the cup being the Owners of the ſaid Tavern, wherupon he was indited and committed, & this matter appeared in the Inditement, and agreed by Popham, Anderſon, and Periam with the Recorder and Serjants at Law then being there, that this was not Burglary, and yet it was ſuch a Robbery, whereby he was ouſted of the benefit of his Clergy by the Statute of 5. E. 6. Cap. 9. and was hanged.

Burglary.

Ed. 6. 9.

Robbery.

11. AND at the Seſſions then next enſuing [illegible] holden, upon one who had ſtolen a ſilver Baſon & Ewer of the then Biſhop of Worceſter, & the ſale made openly in the day in a Scriveners ſhop in London to a ſtranger, the queſtion was demanded of the Court whether the property were changed by this Sale, ſo that the Biſhop ſhall not have his Plate againe, becauſe it was alledged that they preſcribed that every one of their ſhops in London are good Markets overt through all London every day in the week but Sunday; But agreed by Popham, Egerton, Anderſon, Wrian, and others ſkilfull in the Law then being there, that ſuch a generall cuſtome is not good, and that this Sale made there, albeit it were openly in the ſhop ſo that every one paſſing by might ſee, it ſhall not bind the property as it ſhall doe in Market overt; for a Scriveners & Cutlers Shop or the like, is not proper for the Sale of Plate nor a place to which men will go to ſeek for ſuch a thing loſt or ſtole; But a Goldſmiths Shop is the proper Shop for it, as the Drapers Shop is for Woollen cloath, or the Mercers Shop for Silk, and the like, and to ſuch men will go to ſeek for things of the like nature that are loſt or ſtolen, and not to a Scriveners Shop or the like.

In which caſe Shops in London are Markets Overt, & what not.

And they agreed alſo that a private Sale made in the Shops which are proper to the nature of the thing ſold, ſo that the Paſſers by cannot in reaſon ſee it in their paſſage, cannot bind, for reaſon, (upon which the Law is founded) will not admit any ſuch cuſtome.

Hillary Term, 37 Eliz. in the Kings Bench.

Weſtby *verſus* Skinner *and* Catcher.

1. IN Debt by Titus Weſtby Plaintiff, againſt Thomas Skinner and John Charcher late Sheriffs of London, Defendants. for 440 l. upon Nihil debet, pleaded, and a ſpecial Verdict found, the Caſe appeared to be this, to wit, One Anthony Bullard with others, were bound in a Recognizance in the nature of a Statute-ſtaple of 440 l. to the Plaintif wherupon the Plaintif ſued Execution out of the Chancery againſt the ſaid Anthony and the other that were bound with him for the Bodies, Goods, and Lands of the ſaid Obligers which writ of Execution was delivered to the ſaid Defendants the 8th day of September 30. Eliz. the Defendants then being Sheriffes of London and the ſaid Anthony being then in Newgate in Execution in the cuſtody of the ſaid Defendants for 240 l. at the ſuit of one Robert Deighton, and that afterwards, to wit, the 20th. day of October in the ſame yeer the ſaid Defendants were diſcharged and removed from their ſaid Offices, and Hugh Offeley, Richard Saltonſtall were then made Sheriffes of London, and that the ſaid Anthony being in Execution for the one and the other debt, the ſaid Defendant the ſaid 20th. day of October by Indenture delivered the ſaid Anthony to the ſaid new Sheriffes in Execution for the ſaid debt of the ſaid Robert Deighton not giving them any notice of the ſaid Execution made for the Plaintiff, and ſuffered the ſaid Anthony to goe at large; And whether the Defendants ſhall be charged for this eſcape was the queſtion.

See this caſe in Coke 7. Report. fol 71. 6.

Priſoners in Execution to be delivered over to the new Sheriff by Indenture, and all the executions to be therin moved

And the eſcape was alledged by the Declaration to be ſuffered by the ſaid Defendants the ſaid 20. day of October, 30 Eliz. and it was moved by Tanfield, that the new Sheriffs ought to take notice of their Priſoners remaining in the Goal, at their coming into their Office, at their perill, and ought to enquire and ſearch for the cauſes that then were in cuſtody, and not to deliver them of their own head without due courſe of Law.

And he put the caſe, That if the old Sheriff had been dead, in the mean time before the new Sheriffs had been made, ſhal this be an excuſe to the new Sheriffs that they had no notice for what cauſe this Anthony had been in Priſon, if they ſuffer him to eſcape? And he ſaid that it ſhall not, no more here; but per Curiam the new Sheriff ſhall not be charged with this Eſcape, as to the 440 l. of which they had no notice; for if this caſe which was private in the knowledge of the ancient Sheriff only upon a Writ directed to them at the ſuite of any party, the new Sheriffs cannot by intendment have any knowledge, unleſſe it be given to them by the old Sheriffs, to whom the Writ of Execution was directed and delivered.

And the caſe of one Dabridgecourt, who was Sheriff of Warwick, and had one in Execution whom he kept in a private Priſon by himſelf, for all his Executions in the Town of Warwick; and when he was diſcharged of his Office, and a new Sheriff made, Dabridgecourt ſaid to the new Sheriff, That he had ſuch a one in Execution in his cuſtody, and offered to the ſaid Sheriff to put him in the Indenture amongſt his other Priſoners delivered to the new Sheriff, but would have had the ſaid old Sheriff to have ſent for the ſaid new Sheriff to have taken him into his cuſtody, but the new Sheriff refuſed to receive him, unleſſe Dabridgecourt would deliver him into the common Gaol of the County, which was in the Town of Warwick, wherupon afterwards the Priſoner eſcaped; And Dabridgecourt was charged with this Eſcape, and not the new Sheriff, for he is not compellable to take the Priſoners of the delivery of the old Sheriff, but in the common Goal of the County, and the old Sheriff remains chargeable with the Priſoner, untill he be lawfully diſcharged of him, and if the Sheriff dies, the party ſhall be rather

at a prejudice, then the new Sheriff, without cauſe charged with him. And in ſuch a caſe the party who ſued the execution may help himſelf, to wit, by the remaining of the body by a Corpus cum cauſa, wherby he may be brought to be duly in execution, and this under a due Officer.

And Anderſon, Periam, and other Juſtices were alſo of opinion, that the ſaid Skinner and Catcher are to be charged with the eſcape in the principall caſe, wherupon Judgment was given for the Plaintiff, which was entred; Hillar. 34 Eliz. Rot. 169. in the B. R.

Fulwood *verſus* Ward.

2. IN a Writ of Annuity brought in the Common Pleas by George Fulwood Plaintiff againſt William Ward Defendant, the Caſe was thus.

The Queen was ſeiſed of a Barn and Tithes of Stretton, in the County of Stafford, for the life of the Lord Paget, and being ſo ſeiſed, demiſed it by Letters Patents, dated 21. June, 29 Eliz. to the ſaid William Ward for 21. years, wherupon the ſaid Ward by Writing dated, 30. June, 29 Eliz. granted to the ſaid Plaintiff an Annuity or yearly Rent of 10 l. out of the ſaid Barn and Tithes for 15. years then next enſuing, payable yearly upon the 8. day of November, with clauſe of Diſtreſſe. The Lord Paget died the firſt day of March, 32 Eliz. and for the Arrearages after his death, the Plaintiff brought this Writ of Annuity, and for the difficulty therof in the Common Pleas, the Caſe came this Term to be argued before all the Juſtices and Barons at Serjeants-Inn in Fleetſtreet, where it was agreed by Walmſley, Fennor, and Owen, that the Annuity was gone by the determination of his Eſtate in the Land who made the Grant, for they ſaid that preſently upon the Grant made as before it was a Rent-charge, for by ſuch a Rent granted in Fee, the Fee ſhall be in his Heirs, albeit the Grantee dies before any Election made; and ſuch a Rent is payable from the beginning at the Land, as appeareth by 12 E. 4.

And by grant of Omnia, terras, tenementa, & hereditamenta, ſuch a Rent will paſſe, ergo, it is a Rent-charge and not an Annuity untill the Election made, and by the determination therof in the nature of a Rent, the Election is gone, as by Babington and Martin, 9 H. 6. by the recovery of Land charged with ſuch a Rent by elder Title, the Annuity is gone as it ſeems by their opinion, and by them and by Littleton upon a Rent-charge granted with Proviſo, that he ſhall not charge the perſon of the Grantor, it will exclude the charge of the perſon, which proves that the Land is charged Originally, and not the perſon, for otherwiſe the Proviſo would be void for the repugnancy; And if ſo, whenſoever the Land is diſcharged, as by purchaſe, diſcent, or the like, the perſon therby is alſo diſcharged, and therfore the Judgment here ſhall be, that the Plaintiff ſhall be barred.

But by the chief Juſtices, chief Baron, and all the other Juſtices and Barons, the Plaintiff ought to have Judgment in this caſe to recover the Annuity, for the Law gives him at the beginning an Election to have it as a Rent or an Annuity, which matter of election ſhall not be taken from him, but by his own Deed and folly, as in caſe where he purchaſe part of the land charged, in which caſe by his own Act he hath excluded himſelf of his Election. But if a Feoffee upon condition grant a Rent-charge, and preſently break the Condition, wherupon the Feoffor re-enter, ſhall not the Feoffee be charged by Writ of Annuity, ſurely it ſhall be, againſt all reaſon that he by his own act, without any folly of the Grantee, ſhall exclude the Grantee of his Election which the Law gives at the beginning.

And they denied the opinion of 9 H. 6. to be Law; But if the Diſſeiſor grant a Rent-charge to the Diſſeiſee out of the Land which he had by the Diſſeiſen

Diſſeiſen by his re-entry, before the Annuity brought, the Annuity is gone; for this was his own act, yet in effect all of them agreed, that Prima facie, it ſhall be taken as a Rent-charge, of which the Wife ſhall be endowed, as hath been ſaid, which paſſe by grant of Omnia hereditamenta, and which is payable at the Land; but the reaſon is, becauſe it is expreſly granted out of the Land, and alſo for the preſumption of Law, that it is more beneficiall for the Grantee to have it in ſuch a degree, then in the other. But neither the preſumption of Law, nor the expreſſe Grant therof as a Rent, ſhall not take away from the Grantee the benefit of his Election, where no default was in him, but that upon his Election he may make it to be otherwiſe, as ab initio. And therfore by Popham, If a Rent-charge be granted in tail, the Grantee may bring a Writ of Annuity, and therby prejudice his Iſſue, becauſe that then it ſhall not be taken to be an Intail, but as a Fee-ſimple conditionall, ab initio. And if a Termer for two years grant a Rent-charge in fee, this as to the Land is but a Rent charge for two years, and if he avow for it upon the determination of the Term, the Rent is gone, but by way of Annuity it remains for ever, if it be granted for him and his Heirs, and aſſets deſcend from him who granted it.

And if a Rent-charge be granted in fee, and doth not ſay for him and his Heirs, if the Grantee brings his Writ of Annuity, the Heir ſhall never be charged therwith, yet if he had taken it as a Rent-charge, the Land had been charged with it in perpetuity.

And by him the cauſe why the Proviſo that he ſhall not charge the perſon of the Grantor upon the grant of a Rent-charge is good, is, becauſe the perſon is not expreſly charged by ſuch a Grant, but by operation of Law.

But in ſuch a caſe, a Proviſo that he ſhall not charge his Land is meerly void for the repugnancy, becauſe there the Land is expreſly charged by preciſe words, and therfore if it be expreſly compriſed in ſuch a Grant, that the Grantee may charge the Land, or the perſon of the Grantor, at his Election; provided then afterwards that he ſhall charge his perſon, is not good, *Cauſa patet.*

And all agreed, that upon a Rent granted upon equality of partition, or for allowance of Dower, or for recompence of a Title, an Annuity doth not lye, becauſe it is in ſatiſfaction of a thing reall, and therfore ſhall not fall to a matter perſonall, but alwaies remains of the ſame nature as the thing for which it is given. And afterwards the ſame Term Judgment was given in the Common Bench, that the Plaintiff ſhall recover, which is entred, &c.

And in the ſame caſe, Clark vouched that it was reported by Benloes in his Book of Reports; where a Rent was granted out of a Rectory by the Parſon who afterwards reſigned the Parſonage, that it was agreed in the Common Pleas in his time, that yet a Writ of Annuity lies againſt the Grantor upon the ſame Grant, to which all, who agreed on this part, agreed that it was Law.

Butler *verſus* Baker *and* Delves.

3. IN Treſpaſſe brought by John Butler againſt Thomas Baker, and Thomas Delves, for breaking his Cloſe, parcell of the Manor of Thoby, in the County of Eſſex, upon a ſpeciall Verdict, the Caſe was thus. See this caſe in *Cookes* 3. Report, *fol* 25

William Barners the Father was ſeiſed in his Demeſne as of fee, of the Mannor of Hinton in the County of Glocester, holden of the King by Knights-ſervice in Capite, and being ſo ſeiſed, after the Marriage had between William his Son and heir apparant, and Elizabeth the Daughter of Thomas Eden Eſquire, in conſideration of the ſame Marriage, and for the Joynture of the ſaid Elizabeth, aſſured the ſaid Mannor of Hinton, to the uſe

uſe of the ſaid William the Son, and Elizabeth his Wife, and the Heirs of their two bodies lawfully begotten, and died, by whoſe death the Reverſion alſo of the ſaid Mannors deſcended to the ſaid William the Son, whereby he was ſeiſed therof accordingly, and being ſo ſeiſed, and alſo ſeiſed of the Manor of Thoby, in his Demeſne as of Fee holden alſo of the Queen by Knights-ſervivice in chief, and of certain Lands in Fobbing in the ſaid County of Eſſex, which Land in Fobbing with the Mannor of Hinton, were the full third part of the value of all the Land of the ſaid William the Son, and he made his Will in writing, wherby he deviſed to his ſaid Wife Elizabeth his ſaid Mannor of Thoby for her life, in ſatisfaction of all her Joynture and Dower, upon condition, that if ſhe take to any other Joynture, that then the Deviſe to her ſhall be void, and after her deceaſe he deviſed that the ſaid Mannor ſhall remain to *Thomas* his Son, and the Heirs Males of his body, and for default of ſuch Iſſue, the remainder to *Thomas* brother of the ſaid *William* for his life, the remainder to hir firſt, ſecond, and third Son, and to the Heirs Males of their bodies, and ſo to every other Iſſue Male of his body, and for default of ſuch Iſſue, the remainder to *Leonard Barners* his brother, and to the Heirs Males of his body, the remainder to *Richard Barners*, and the Heirs Males of his body, the remainder to the right Heirs of the Deviſor: *William* the Son dies, having Iſſue *Thomas* his Son, and *Griſell* his Daughter, Wife to the ſaid *Thomas Baker*; the ſaid *Elizabeth* by Paroll in *pais* moved her Eſtate in the ſaid Mannor of *Hinton*, and after this entred into the ſaid Mannor of *Thoby*, after which the ſaid *Elizabeth* died, and *Thomas* the Son, and *Thomas* the Uncle died alſo without Iſſue Male, after which the ſaid *Leonard* took one *Mary* to Wife, and died, having Iſſue *Anthony Barners*, after which the ſaid *Mary* took the ſaid *John Butler* to Husband, and after this the ſaid *Anthony* aſſigned to the ſaid *Mary* the ſaid Mannors of *Thoby*, in allowance for all her Dower, wherby the ſaid *John Butler* as in the right of his Wife entred into the ſaid Mannor of *Thoby*, wherby the ſaid *Thomas Delves* by the commandment of the ſaid Baker entred into the ſaid Cloſe, of which the Action is brought as in right of the ſaid Griſell; And whether this entry were lawful or not, was the queſtion, which was argued in the Court, in the time of the late Lord Wray; and he, and Gawdy held ſtrongly that the entry of the ſaid Delves was lawfull, but Clench and Fennor held alwaies the contrary, whereupon it was adjourned into the Exchequer Chamber.

But they all agreed, that the Waiver made by the ſaid Elizabeth by parole in pais, was a ſufficient Waiver of her Eſtate in Hinton, and the rather, becauſe of the Statute of 27 H 8. cap. 10. the words of which are; That if the Joynture be made after the Marriage, that then the Wife ſurviving her Husband may after his death refuſe to take ſuch Joynture.

And now it was moved by Tanfield, that Judgment ought to be given for the Plaintiff, for by the Waiver of the Wife, the Inheritance of Hinton is now to be ſaid wholly in the Husband ab initio, and therfore that with Fobbing being a whole third part of the whole Land which now is to be ſaid to be left to diſcend to the Heir of the Deviſor, as to Thoby; is good for the whole, and if ſo then no part therof deſcends to Griſell, and therfore the entry of the ſaid Delves in her right is wrongfull.

Coke Attorney-general to the contrary, for he ſaid, That it is to no purpoſe to conſider what Eſtate the Deviſor had in the Mannor of Hinton, by reaſon of this Waiver made by his Wife, Ex poſt facto after his death. But we are to ſee what Eſtate the Deviſor had in it in the view of the Law, at the time of his death before the Waiver, and according to it the Law ſhall adjudge that he had power to make his Deviſe by means of the Statute; and at this time none can adjudge another Eſtate in him but joyntly with his wife, of which Eſtate he had no power to make any diſpoſition, or to deviſe it, or to leave it for the third part to his Heir, for the Statute which is an explanatory

natory Law in this point) ſaies, that he ought to be ſole ſeiſed in ſuch a caſe. And further the Statute of 34 H.8. at the end, is, that the Land which deſcends immediatly from the Deviſor ſhall be taken for the third part, and this Land did not deſcend immediatly, for it ſurvived to the Wife untill ſhe waived it, and therfore this Land is not to be taken for any third part, which the Statute purpoſed to have been left to the Heir, and therfore ſo much ſhall be taken from Thoby as with Fobbin ſhall be a third part to deſcend, wherby Griſell the Heir hath good right yet to part of Thoby, and therfore the entry of the ſaid Delves in her right by commandment of her husband not wrongfull.

Periam chief Baron, Clench, Clark, Walmſley, and Fennor, That now by reaſon of the Waiver in the Deviſee ſhall be ſole ſeiſed ab initio, for the ſaid Elizabeth might have had Dower therof, if ſhe would, as in the like caſe it is adjudged in 17 E.3.6. and therfore a ſole Seiſin in the Husband, and the deſcent to the Heir in ſuch a caſe upon the Waiver, ſhall take away the entry of him who hath right to it. And therfore the caſe now for the Mannor of Hinton is within the very letter of the Statute, as well for the ſole Seiſin which was in the Deviſor, as for the immediate deſcent which was from the Deviſor to his Heir, and therfore remains to the Heir for a good third part of the Inheritance of the Deviſor, by the very letter of the Statute, and if the Letter had not helped it, yet it ſhall be helped by the purport and intent of the Statute, which ought to be liberally and favourably conſtrued for the benefit of the Subject, who before the Statute of Uſes might have diſpoſed of his whole Land by reaſon of Uſes by his Will, and the Statute of 27 H.8. excludes him therof, and therfore the Statute of 32. & 34 H. 8. are to be liberally expounded as to the Subject for the two parts, and the rather becauſe it appeareth by the preamble of the Statute of 32 H. 8. that it was made of the liberality of the King, and becauſe that by 34 H. 8. it appeareth that it was made, to the intent that the Subject ſhall take the advantage and benefit purpoſed by the King in the former Statute, by all which it appeareth (as they ſaid) that the ſaid Statutes ſhall be liberally expounded for the advantage of the Subject, and for his benefit, and not ſo ſtrictly upon the letter of the Law as hath been moved; and ſo they concluded that Judgment ought to be given for the Plaintiff.

Popham and Anderſon the two chief Juſtices, and all the other Juſtices and Barons held the contrary, and that Judgment ought to be given againſt the Plaintiff; and that by the very letter and purport of the Statutes of 32 & 34 H.8. for they ſaid, they are to conſider what Eſtate the Deviſor had in the Land at the time of his Deviſe made, without regard to that which might happen by matter Ex poſt facto upon the Deed of another: and if it had been demanded of any apprized in the Law, at the time when the Will was made, what Eſtate the Deviſor then had in the Mannor of Hinton, none is ſo unlearned to ſay, that he had other Eſtate in it, then joyntly with his Wife: And if ſo, it follows that this Mannor was then out of the letter and intent of the Law, for he was not then ſole ſeiſed therof, nor ſeiſed in coparcenary, nor in common, and by the words he ſhould be ſole ſeiſed in Fee-ſimple, or ſeiſed in Fee-ſimple in coparcenary, or in common: It appeareth that the intent of the Statute was, that he ſhall have full power of himſelf, without the means or aid of another, to diſpoſe of the Land, of which he is by the Statute to make diſpoſition, or to leave it to his Heir, and this he hath not for the Mannor of Hinton here.

And further the words of 32 H.8. are, That the Deviſor hath full power at his Will and pleaſure to deviſe two parts of his Land ſo holden as here, and this is to be intended of ſuch Land of which he then had full power to make diſpoſition, and this he could not then do for the Mannor of Hinton.

And further the words of 34 H. 8. are that the diviſion for the parts ſhall be made by the Deviſor or Owner of the Land by his laſt Will in writing, or otherwiſe in writing, and in default therof by commiſſion, &c. And can any ſay with reaſon, that it was the intent of the Statute that he ſhall make the Diviſion of other Lands then of thoſe of which he then had full power to deviſe or to leave to his heir without any future accident to help him, or the mean of Anthony by matter Ex poſt facto; It is cleer that reaſon cannot maintain it. And the words following in the Act, which are, That the King ſhall take for his third part the Land which deſcended to the Heir of the Eſtate tail, or of Fee-ſimple immediatly after the death of the Deviſor; much enforce the opinion on this ſide, for it cannot be ſaid upon the death before the Waiver that this Manor of Hinton was immediatly deſcended, ergo, it ought not to be taken for the third part.

And further the words are, If the Lands immediatly deſcended upon the death of the Deviſor, &c. do not amount to a full third part, that then the King make take into his hands ſo much of the other Lands of the Deviſor as may make a full third part, &c. wherby it is cleer, that in this caſe if the wife had not waived her Eſtate for ten years after the death of the Deviſor, that for all this time the Queen could not meddle with the Manor of Hinton, and therfore in the mean while ſhe might well have ſo much of the Manor of Thoby, which might well have made a full third part to her, and for ſo much which ſhe took the Will was alwaies void, which ſhall never be altered nor made good by any Waiver Ex poſt facto. And although the Waiver of the Feme put the Inheritance entirely in the Deviſor, and in his Heir, in relation to divers reſpects, yet as to other reſpects he ſhall not be ſaid in them with ſuch relation, and eſpecially upon the Statute in which we now are to reſpect the power as it was in him at the time of his death, before this future Contingent.

And by Popham, If the expoſition on the other ſide ſhall hold place upon the Statute, perhaps a man ſhall not ſee by the ſpace of ſix years, or more, after the death of a Deviſor, how his Deviſe ſhall work: As a Feoffment in Fee is made to I. S. and a Feme Covert, and their Heirs, of 10 l. Land holden by Knights-ſervice in Capite, which I. S. hath 20 l. Land in fee ſo holden alſo; I. S. makes a Deviſe of his 20 l. Land, the Husband lives 60. years after; none will or can deny but that for this time the Deviſe is not good for two parts, now the Husband dies, and the Wife waives the Eſtate made to her, this puts the Inheritance therof in the Heir of I. S. with relation to divers reſpects, but not to this reſpect to make the Will now good for the whole 20 l. Land, which therfore was void for the third part therof, for the Will which once was void by matter Ex poſt facto, after the death of the Deviſor, cannot be made good: And by him the deſcent in ſuch a caſe is not ſuch that it ſhall take away the entry of him who hath right, becauſe it was not an immediate deſcent in Deed, but upon the operation of Law which gave Wardſhip and the like, but not to prejudice any third perſon.

And he ſaid, that although the Queen, or other Lord upon eviction of the Land deſcended, or the determination of the Eſtate therof, may reſort to Lands deviſed or aſſured, and take a third part therof, yet therby the Deviſe or Aſſurance remains effectuall againſt the Heir, but this is by a ſpeciall clauſe in the Statute of 34 H. 8. which gives it to them, but no ſuch remedy is given to the Deviſee to help him if his part be abridged, or evicted: And the words are preciſe, to wit, If the part left or aſſigned to the King, or to any Lord, at any time during their Intereſt therin be evicted, &c. that they ſhall have ſo much of the two parts reſidue, as ſhall make a full third part of the remainder not evicted, &c. Wherby it appeareth, that this is given only for the benefit of the Lords, and not of the Heir, nor of the Deviſee; for if after

the

the Intereſt of the Queen, or other Lord be determined, this which was left be evicted from the Heir, it ſhall not be helped againſt the deviſe, but the Deviſe remains good to the Deviſee againſt the Heir for the whole Land deviſed, wherby it appeareth, that it was the very purport and intent of the Statute, that the Deviſe remain as it was at the time of the death of the Deviſor, without having regard to that which hapneth Ex poſt facto, unleſſe for this point helped by this ſpeciall clauſe of the Statute, and this is for the Lord and his Intereſt only, and for no other: And by him alſo cleerly the Statute which is an explanatory Law ſhall never be taken by equity in the preciſe point explained to impugne the point of explanation, as here the Statute wills that the Eſtate of Inheritance comprized in the former Statute, ſhall be explained to be Fee-ſimple, it cannot now by any equity be, as to the power to make a Deviſe which is meerly given by the authority of the Statute, ſaid to be of any other Eſtate then Fee-ſimple, of which a Deviſe may be made: And therfore if Land be given to another and his Heirs for the term of another mans life, a Deviſe cannot be made of this, becauſe it is not an Inheritance in Fee-ſimple, but only the limitation of a Free-hold: And where the Statute ſaith, having a ſole Eſtate, we cannot by any equity, that it ſhall be taken of any joynt Eſtate, as to make any diſpoſition of that which ſhe had in Joynture, and therupon the greater part reſolved that Judgment ſhall be given againſt the Plaintiff for the Defendants.

Southwell *verſus* Ward.

4. IN a ſecond deliverance between Richard Southwell Eſquire, Plaintiff, and Miles Ward Avowant, by Demurrer upon the Avowry, the Caſe appeared to be this.

That John, Prior of the Church of Saint Faiths in Horſham in the County of Norfolk, was ſeiſed in his Demeſne as of fee, in the right of his ſaid Priory, of 8. Meſſuages, 300. acres of Land, 30. acres of Meadow, 60. acres of Paſture, and 200. acres of Wood, with their Appurtenances in Horſham aforeſaid: And ſo ſeiſed, the ſaid Prior with the aſſent of his Covent, by their Deed indented, ſhewn forth, bearing date the firſt day of January, 13 E. 4. and by licence of the King aforeſaid, granted to William then the Maſter of the Hoſpitall of St. Giles in Norwich, and to the Brothers of the ſame Hoſpitall, and to their Succeſſors 200. Fagots, and 200. Focalls called Aſſle-wood, yearly to be taken of all the Lands and Tenements of the ſaid Prior and Covent in Horſham aforeſaid, by the Servants of the ſaid Prior and Covent, and their Succeſſors, yearly to be carried to the ſaid Hoſpitall, at the coſts and expences of the ſaid Prior and Covent, and their Succeſſors, at the Feaſt of St. Michael, or 20 s. of lawfull money for them at the election of the ſaid Maſter and Brethren, and their Succeſſors, to take yearly in the ſame Lands and Tenements in Horſham, to the uſe of the poor and infirm perſons there being or coming: So that if it happen the ſaid Fagots and Focalls, or the ſaid 20 s. for them to the ſaid Maſter and Freres in form aforeſaid, to be arrear in all or part. &c. then they may diſtrain in the ſaid Lands and Tenements, and the Diſtreſſe detain until they be fully ſatisfied of the ſaid Fagots and Focals, or of the ſaid 20 s. for them as is aforeſaid, with this Proviſo further, That if at any one or more times, the ſaid Maſter and Brethren have choſen to have the Fagots and Focals, yet at any other time they make the 20 s. for them, and although they have taken the 20s. for them, once, or oftner, yet at any other time they may take the Fagots and Focals themſelves, and that they may ſo vary toties quoties, and diſtrain for them accordingly, reaſonable notice being given of their Election, in form aforeſaid.

And

And the ſaid Maſter and Brethren granted by the ſame Deed to the ſaid Prior and Covent, and their Succeſſors, that they or, others ſufficiently warranted by them, would give ſufficient notice of their election yearly, the firſt Sunday of April, in the Church of the ſaid Hoſpital, to ſome Officer of the ſaid Prior and Covent, and their Succeſſors, if they ſend any thither for this cauſe.

By force of which Grant, the ſaid Maſter and Brethren were ſeiſed of the ſaid yearly rent of the ſaid 200. Fagots, and 200. Focals called Aſtlewood accordingly, and ſo being ſeiſed, they by their ſufficient Writing enrolled of Record in the Chancery, in the firſt year of the late King Ed. 6. gave and granted to the ſame King the ſaid Hoſpitall, & all the Lands Tenements and Hereditaments of the ſaid Hoſpitall; To have and to hold to him, and his Heirs and Succeſſors for ever, wherby the ſaid King was therof, and of the ſaid annuall Rent ſeiſed accordingly, and ſo ſeiſed the 7. day of May, in the ſame year, the ſaid King Edw. by his Letters Patents, bearing date the ſame day and year, granted the ſaid Hoſpitall and the rent of the ſaid Fagots, and Focals, and other the Premiſſes, to the Major, Sheriff, Citizens, and Commons of the City of Norwich, and to their Succeſſors for ever: and for 1600. Fagots, and 1600. Focals of the ſaid annuall rent of 200. Fagots, and 200. Focals, being arrear at the Feaſt of S. Michael the Arch-angel, 23 Eliz. the ſaid Ward took the Diſtreſſe, and made Conuſance as Bailiff to the ſaid Major, Sheriff, &c. And it was moved that the Avowry was not good, firſt, becauſe it being matter of Election which was granted to the Maſter and Brethren, and their Succeſſors, to wit, the Fuell, or the 20 s. it doth not appear that they ever made any election of the one, or the other, and untill it appeareth that they have made their Election to have the one or the other, it is not to be granted over by generall words: But by the diſſolution of the Hoſpitall the grant for want of Election before is gone and determined.

And further, wheras the King made his Grant of the Hoſpitall, and of all the ſaid rent of Fagots and Focals, without making mention of 20 s. for the ſame, it was moved that if it doth paſſe to the King, yet it doth not paſſe from him to the Major, &c. in as much as he granted it preciſely as a Fuell, wheras it was in him as a Rent of Fuell, or of money at his Election, and therfore the King deceived in his Grant.

And further, here he hath made Conuſance for the Fuell, without making mention of their Election, to have it one way, or another before the taking; but all the Court agreed that the Conuſance was good, and that the return ſhall be awarded to him who made the Conuſance: firſt, becauſe that this caſe is quite out of the caſe of Election, becauſe the rent which is granted is only out of the Fagots and Aſtlewood, and the 20 s. granted is not as a diſtinct thing, but granted as a recompence or ſatisfaction of that, becauſe the Grant is of the Fagots, &c. or of 20 s. for the ſame; ſo that in ſuch a caſe the Seiſin of the 20 s. is a good Seiſin of the Fagots and Focals, and ſufficeth to maintain an Aſſiſe upon this Seiſin for the Fuell, but not for the 20 s. as money paid for Suit of Court is good Seiſin of the Suit: And the 20 s. here is not granted in nature of a Rent of ſo much, but as an allowance in ſatisfaction for the Fuell.

And Popham conceived, that he ſhall have an Action of debt for this 20 s. for the fuell, after the Election made if he will, as for a Nomine pœne, becauſe it is not the principall thing granted of which the Inheritance is, but a caſuall Accident in recompence therof if he will have it, or otherwiſe he may diſtrain for it, becauſe it is ſo limited to be done by the Grant it ſelf: But they ſhall never have aſſurance of the 20 s. as a thing of Inheritance, becauſe it is not the thing of which the Inheritance is granted, but only granted in allowance and ſatisfaction of it, and therfore not to be reſembled to the caſes where 20. quarters of Corn, or 20 s. Rent is granted to

one

one and his Heirs, or other ſuch thing which ſtands meerly in the diſjunctive, to wit, to have, or take, the one, or the other.

And therfore ſuppoſe the Prior was to carry the Fuell yearly to the Hoſpitall at the Feaſt of S. Michael, and yet then the Maſter and Brethren might have refuſed the Fuell, and held themſelves to have the 20 s. by force of the Grant, for then originally the Election ought to have been made there: But upon the Covenant which cometh afterwards on the other part, the notice ought to have been given in April yearly before, but if it be not done, there lies but an Action of Covenant for the not doing of it, for this will not alter the nature of the Grant which was full and perfect in Law before. And here he needs not make this appearance in the Conuſance, that any Election was made before the taking of the Cattel, becauſe the Grant is of the Fuell it ſelf, and if the other had made Election before to have the 20 s. for the Fuell, this ought to have been ſhewn on the other ſide in Bar of the Avowry, to wit, that he brought to them the Fuell yearly according to the Grant, and that they refuſed it, and required the 20 s. every time for it, in which caſe for every ſuch refuſall and Election to have the 20 s. for it, it had excluded him to have any Fuell for this year ſo refuſed.

And by Popham alſo, you may ſee a great diverſity between this caſe, where a man is to deliver to another 20. Loads of Wood, or 20. Loads of Hay yearly out of ſuch Land, and he does not tender them for divers years, and where a man is to take ſo much Fuell, or Hay out of the Land of another, and he takes it not for divers years, for in the former caſe the party who is not ſatisfied ſhall have all the arrears, be it never ſo prejudiciall to the Grantor, becauſe it was through his own default that it was not paid, but in the other caſe as appeareth, 27 H. 6. 10. he ſhall not have any remedy for the arrears for the years paſt, becauſe he took them not yearly as they were due, which ſhall not turn the other party to prejudice, that he ſhall want Fuell, or Hay himſelf, by reaſon of the arrears which hapned through the default of him who ought to take it, and the Judgment was given for him who made the Conuſance, and it is entred in the Kings Bench, Mich. 33. & 34. Eliz. Rot. 229.

Southwells *Caſe.*

5. AT the end of this Term, upon the proceeding againſt Southwell the Jeſuite, it was moved by the Attorney-general to Popham chief Juſtice, the Maſter of the Rolls, Periam chief Baron, Walmſley, and Owen Juſtices, and Ewens one of the Barons of the Exchequer upon the form of Indictments, upon the Statute of 27 Eliz. for Jeſuits, &c. If it need be comprehended in the Indictment of a Jeſuite, who cometh into the Realm of England, or any Dominions of the Queen, or ſhall be taken therin 40. daies after the end of this Seſſion of Parliament, that if he doth not ſubmit himſelf within three daies of his landing, if he cometh in after the 40. daies according to the Proviſo of the Statute, or that he was not ſo infirm of his body) where he came in before the 40. daies) that he was not able to paſſe out of the Realm by the time preſcribed at firſt, becauſe that it is compriſed in the body of the Act, that it ſhall not be lawfull for any Jeſuite, &c. being born within this Realm, or any other the Queens Dominions, & made after the Feaſt of S. John Baptiſt, in the firſt year of her Raign, or after this to be made by any authority derived, &c. from the See of Rome to come, be, or remain in any part of this Realm, &c. otherwiſe then in ſuch ſpeciall caſes, and upon ſuch ſpeciall occaſions, and for ſuch time only which is expreſſed in this Act, and if he does, that this offence ſhall be adjudged high Treaſon &c.

And after deliberation taken, and conſideration and conference amongſt themſelves had, they all reſolved that the better courſe was to omit this in the Indictment, notwithſtanding it be compriſed in the body of the Act in the ſame manner as if it had been only in a Proviſo; in which caſe it is to the Priſoner to help him by means of ſuch a Proviſo, if he can do it: for the words (other then, &c.) are but as referring to the proviſion ſubſequent in the Statute, in which caſe this matter ſhall be uſed but as the Proviſo it ſelf ſhall be; and according to this it hath been commonly put in practiſe by all the Juſtices in all places after the Statute untill now.

And they agreed alſo, that it need not be ſhewn whether he were made a Jeſuit, or Prieſt, &c. either beyond Sea, or within the Realm, becauſe wherſoever it was, it is within the Law if he were made by the pretended authority of the See of Rome.

But they agreed that it ought to be compriſed in the Indictment that he was born within this Realm, or other Dominions of the Queen, but need not to ſhew where, but generally, Et quod J.S. natus infra hoc Regnum Angliæ, &c. And the Indictment ought to compriſe that he was a Jeſuite, or Prieſt &c. by authority challenged or pretended from to the See of Rome, becauſe that this is in the body of the Act, without ſuch reference as in the other point, and according to this reſolution the proceeding was againſt the ſaid Southwell.

Eaſter Term, 37 Eliz.

Pigots *Caſe.*

1. AFter the death of Valentine Pigot Eſquire, a Commiſſion was awarded in nature of a Mandamus, and after the death of Thomas Pigot Father of the ſaid Valentine, a Commiſſion was awarded in nature of a Diem clauſit extremum, and the ſaid Commiſſions were awarded to one and the ſame Commiſſioners, who by one Inqueſt took but one Inquiſition upon theſe ſeverall Commiſſions in this form.

Inquiſitio indentata capta apud, &c. virtute Commiſſ. in natura brevis de diem clauſit extremum eiſdem Commiſſ. direct. &c. ad inquirendum poſt mortem Thomæ Pigot, Ar. nuper defuncti patris predict. Valentin. per ſacramentum, &c. Qui dicunt, &c. After which all the points of the Commiſſion after the death of the ſaid Valentine are enquired of; but for the Commiſſions after the death of the ſaid Thomas Pigot, it is imperfect in ſome points, as who is his Heir, &c. is not found.

And by Popham and Anderſon, this Inquiſition is void as to Valentine as well as for Thomas, for their authorities which are the Commiſſions are by ſeverall Warrants which cannot be ſimul & ſemel by one and the ſame Inquiſition executed and ſatisfied, but ought to be divided and ſeverall, as the Warrant is ſeverall, and yet the ſame Inqueſt which found one Inquiſition by one Warrant, may alſo find another Inquiſition by the other Warrant, but divided and ſeverall, and not as one, for as it is made it does not appear upon which of the Commiſſions the Inquiſition as to Valentine is taken, for as it is made it may be as well upon the one as upon the other, for it is ſaid to be by vertue of both the Commiſſions, which cannot be, and therfore is not good in any part, and ſeverall Warrants ought to be ſeverally executed, and therfore although the Eſcheator as appeareth by 9 H. 7. 8. may take an Inquiſition Virtue officii, and at the ſame day another Inquiſition, Virtue brevis by one and the ſame Inqueſt, yet this cannot be drawn into one

one Inquiſition: And that which is found Virtute officii contrary to that which before the ſame day Virtute libris, as that it found more Land, is good for the King. And this their opinion was certified to the Court of Wards.

Sir Rowland Haywards *Caſe.*

2. THis Caſe was alſo ſent to the ſame chief Juſtices out of the Court of Wards: Sir Rowland Hayward being ſeiſed in his Demeſne as of Fee, of the Mannors of D. and A. in the County of Salop, and of other Lands in the ſame County, part whereof were in Leaſe for years by ſeverall Indentures, rendring certain rent, part in the poſſeſſions of ſeverall Copyholders, and part in Demeſne in poſſeſſion out of Leaſe, by Indenture dated 2. September, 34. Eliz. made mention that this was for, and in conſideration of a certain ſum of money to him paid by Richard Warren Eſquire, and others, demiſed, granted bargained and ſold to the ſaid Richard Warren and the others, the ſaid Mannors, Lands, and Tenements, and the Reverſion and Remainder of them, and of every part of them, and the Rents and Profits reſerved upon any Demiſe therupon for 17. years, next enſuing the death of the ſaid Sir Rowland, rendring a Roſe at the Feaſt of S. John Baptiſt yearly, if it be demanded, which Deed was acknowledged to be enrolled, and afterwards by another Indenture covenanted and granted for him and his Heirs, hereafter to ſtand ſeiſed of the ſaid Mannors, Lands, and Tenements, to the uſe of the ſaid Sir Rowland, and of the Heirs Males of his body, and afterwards and before any Attornment to the ſaid Richard Warren and his Co-leſſees, or any of them, the ſaid Sir Rowland died ſeiſed of the ſaid Mannors, Lands, and Tenements, leaving a full third part of other Lands to deſcend to his Heir.

See this caſe in *Coke* 2. Report 35.

And it was moved on the Queens part, that for part, to wit, for that which was in poſſeſſion it paſt to the ſaid Richard Warren, and the other by way of Demiſe at Common Law, and therfore it doth not paſſe afterwards by way of Bargain and Sale as to the Remainder, and that therfore for the Services of the Mannors, and for the Rents reſerved upon the Demiſe, theſe remain to the Heir who was in Ward to the Queen, and within age, and therfore to the Queen by reaſon of the Tenure which was in Capite by Knights-ſervice.

But by Popham and Anderſon it is at the Election of the ſaid Richard Warren and his Co-leſſees to take it by way of Demiſe, or by way of Bargain and Sale, untill that by ſome act done, or other matter, it may appear that their intent is to take it another way, for the Uſe in this caſe may well paſſe without the Inrolement of the Deed, becauſe the Statute of 27 H. 8. of Inrolements, extends but to where a Free-hold is to paſſe, and the Uſe ſo paſſing, this ſhall be executed by the Statute of 27 H. 8. of Uſes, and therfore if the ſaid Richard Warren and his Co-leſſees after the death of the ſaid Sir Rowland Hayward, would elect to take it by way of Bargain and Sale, they ſhall have all the Reverſions, Remainders, Rents, and Services, as well as the Land in poſſeſſion executed to them by the Statute of Uſes: And of the ſame opinion were all the Juſtices in Trinity Term following, upon their meeting at Serjeants-Inne for another great cauſe.

Trinity

Trinity Term, 37 Eliz.

where a Juſtice of Peace bails one who is not bailable, he ſhall be fined, and albeit he be committed but for ſuſpicion of Felony, and hath no notice of his offence.

1. VPon an Aſſembly of all the Juſtices and Barons of the Exchequer at Serjeants-Inne in Fleetſtreet, this Term it was reſolved by them, and ſo agreed to be hereafter put in execution in all Circuits; That if a man taken for Felony be examined by a Juſtice of Peace, it appeareth that the Felon is not bailable by the Law, and yet the Juſtices commit him to Goal but as upon ſuſpition of Felony, not making mention for any cauſe for which he is not bailable, wherby he is brought before another Juſtice of Peace, not knowing of any matter why he ought not to be bailed, wherupon they bail him, theſe Juſtices ought to be fined by the Statute of 1, & 2. Phil. & Mar. for they offend if they bail him, who by the Statute of Weſtm. 1. is not bailable, and therfore they at their peril ought ſo to inform themſelves before the bail taken of the matter, that they may be well ſatisfied that ſuch a one is bailable by Law, ; and therfore obſerve well the Statute of Weſtm. 1. cap. 18. who is bailable, and who not by the Law. And it ſeems that no Juſtice of Peace could have bailed any one for Felony before the Statute of 1 Rich. 3. cap. 3. which is made void by 3 H. 7. cap. 3. for before this he ought to have been bailed by the Sheriff, or other Keeper of the Priſon where he was in Ward, or by the Conſtable, and by no other Officer, unleſſe Juſtices of the Kings Bench, Juſtices in Eyre, or Juſtices of Goal-delivery.

Herbin *verſus* Chard, *and others.*

2. IN Treſpaſſe by William Herbin Plaintiff, againſt Chard and others Defendants, for a Treſpaſſe made at Pynon Farm in Netherbury and Loder, in the County of Dorſet, the Caſe upon the Demurrer appeared to be this.

The Lord Mordant was ſeiſed of the Farm, in his Demeſne as of Fee, and ſo ſeiſed, demiſed it to Philip Fernam, Elizabeth his wife, and John Fernam the eldeſt Son of the ſaid Philip, for term of their lives, and of the Survivor of them, and the ſaid Eliz. died, after which the ſaid Philip his Father demiſed his part of the Farm by his Deed indented, dated 13. Mart. 32. Eliz. to Philip his Son, and Toby Fernam his Son, for eighty years, immediatly after the death of the ſaid Philip the Father, if the ſaid John Fernam ſhal ſo long live, with divers remainders over for years, depending upon the life of the ſaid John, after which the ſaid Philip the Father died, and John ſurvived him, and demiſed the ſaid Farm to the Plaintiff, upon whom the Defendants entred in right of the ſaid Philip and Toby, and whether their entry were congeable, was the queſtion: And it was moued by Goodridge of the Middle-Temple, that the entry of the Defendant was not lawfull, becauſe the ſaid John was now in by the Leſſor, and not by his joynt Companion.

And further, he had no power to diſpoſe therof beyond his own life; for ſuppoſe that he makes a Leaſe therof for years, and afterwards grant over his Eſtate to a ſtranger, and dies, the Leaſe for years is therby determined, albeit his joynt Companion be yet living, and that his Eſtate continues.

And yet he agreed, that if had made a Leaſe for years, to begin at a day to come, as at Michaelmas following, or the like, that this had been good, for it is an Intereſt in the Grantee to be granted over for the preſumption, that it might be executed in his life; but in the other caſe there is not any poſſibility, that he who hath not but for his life, can demiſe it to begin after the Eſtate made to him is determined.

But

But on the other part, it was moved that the Demiſe remains in force for the life of the ſaid John, for at the firſt every one had an intereſt for the life of the other alſo, and therfore if one Joynt-tenant for life make a Leaſe for years in poſſeſſion, and dies, the Leaſe yet continues.

And Crook the younger alledged, that it was adjudged at laſt Hartf. Term, If a man poſſeſſed of a Term for years in right of his Wife, makes a Leaſe for years of the ſame Lands to begin after his death, & dies during the Term, without other alteration of it, and the Wife ſurvives him, that now the Leaſe made by the Husband, is good, and that the like caſe as this, by the opinion of Clench and Walmſley was decreed to be good in the Chancery.

Arton *verſus* Hare

3. IN a ſecond deliberance between Francis Arton Plaintiff, and Henry Hare Avowant, the caſe appeared to be this.

William Cockſey Eſquire, was ſeiſed in his Demeſne as of Fee, of the Manor of *Wolverton* in the County of *Worceſter*, and ſo ſeiſed in *Octab. Mich.* 7 *Eliz.* levied a Fine of the ſaid Mannor to certain perſons, to the uſe of the ſaid *William* and *Alice* his Wife, and the Heirs of *William*, untill a marriage had between *Martin Croft*, and *Anne Wigſtone*, and after this marriage to the uſe of the ſaid *William* and *Alice* his Wife, and the Heirs of the body of the ſaid *William*, and for defualt of ſuch Iſſue, to the uſe of the ſaid *Martin Crofts* and *Anne*, and the Heirs Males of the body of the ſaid *Martin* upon the body of the ſaid *Anne* begotten, untill the ſaid *Martin* ſhould go about to alien, ſell, grant, or give the ſaid Mannor, or any parcell therof, or to ſuffer any Recovery, or levy any Fine therof, or make any diſcontinuance, *&c.* And after the Eſtate of the ſaid *Martin* and *Anne*, and of the Heirs Males of their bodies to the Premiſſes, by any ſuch attempts determined and finiſhed, then to the uſe of the ſaid *Anne* for her life, and after, to the uſe of the Heirs Males of the body of the ſaid *Martin* upon the body of the ſaid *Anne* lawfully begotten, and for default of ſuch Iſſue, to the uſe of the Heirs of the body of the ſaid *Martin*, and for default of ſuch Iſſue, to the uſe of *Giles Croft* brother of the ſaid *Martin*, and the Heirs Males of his body, untill, *&c.* as before, and after to the uſe of the Heirs of the body of the ſaid *Giles*, and for default of ſuch Iſſue, to the uſe of *Edmund Crofts*, the third brother of the ſaid *Martin*, and of the Heirs Males of his body, as is before limited to the ſaid *Giles*, with remainders over, afterwards the marriage was had between the ſaid *Martin* and *Alice*, after which the ſaid *Martin* and *Giles* died without Iſſue, without any thing done by the ſaid *Martin* to determine his Eſtate, or by the ſaid *Giles* to determine his Eſtate, if any had been.

And it was agreed by all the Court, that as this caſe is, no remainder can enure over to the ſaid Giles, without an attempt precedent by the ſaid Martin to determine his Eſtate, becauſe the Eſtate of Giles is not limited to begin but upon ſuch an attempt precedent.

And in the ſame manner Edmund ſhall have nothing untill the Eſtate of Giles determine by ſome attempt made by him, if the ſaid Giles had an Eſtate, becauſe the Eſtate of Edmund depends upon the attempt made by Giles precedent to it, which not being done, the Eſtate of Edmund never happned to be; and therfore he who cometh in under a Diſcontinuance made by the ſaid William Cockſey, after the death of Martin and Giles without Iſſue, notwithſtanding the Remitter of the ſaid Alice in the caſe, is to have the Land againſt thoſe who come in by the ſaid Edmund, and upon this point only Judgment was given accordingly in the Kings Bench.

Grenningham *verſus* the Executors of *Heydon*.

4. IN Debt upon an Obligation of 200. marks by Richard Grenningham Plaintiff, againſt the Executors of one Ralph Heydon Defendants, the caſe appeared to be this upon Demurrer.

The ſaid *Heydon* was bound to the Plaintiff in 200. marks, the Condition whereof recites, that wheras the ſaid *Heydon* had received of the ſaid *Grenningham* 76 *l.* 6 *s* 8 *d.* before the date of the ſaid Obligation of 200. marks in payment and ſatisfaction of certain Obligations and Bills of debt, remaining in the hands of the ſaid *Heydon*, and ſpecified in the Condition what they were in certain, and the which ſaid Bills & Obligations the ſaid *Heydon* is to deliver, or cauſe to be delivered to the ſaid *Grenningham*, his heirs or aſſigns, before the Feaſt of S. *Michael*, next enſuing the date of the ſaid Obligation, or otherwiſe the ſaid *Heydon*, his Executors, Adminiſtrators, or Aſſigns, or ſome of them before the ſame Feaſt, ſhall make, or cauſe to be made and delivered to the ſaid Plaintiff, his Heirs and Aſſigns, ſuch good and ſufficient Acquittances for the payment of the ſaid ſumms of money formerly mentioned, as the ſaid Plaintiff, his Heirs, Executors, or Aſſigns, ſhall deviſe, or cauſe to be deviſed by the Counſel of the ſaid Plaintiff, his Heirs or Aſſigns, before the Feaſt, without fraud or deceit, that then the ſaid Obligation ſhall be void, *&c.*

And before the Feaſt the ſaid Plaintiff did not deviſe any acquittance; Whether now the Obligation be ſaved by the Diſjunctive, without delivering the Obligations, and Bills before named, before the Feaſt of S. Michael: Rot. 36, & 37.

Eton *and* Monney *verſus* Laughter.

See this Caſe *Coke lib.* 5. 21. by the name of *Laughters* caſe.

5. IN Debt upon an Obligation of 400 *l.* by Thomas Eton, and Roger Monney Plaintiff, againſt Thomas Laughter Defendant, who was bound together with one Richard Rainford to the ſaid Plaintiffs, the Condition of which Obligation was,

That if the ſaid *Richard Rainford* after marriage had between him and *Jane Gilman* Widow, together with the ſaid *Jane*, alienate in Fee, or Fee-tail, all that great Meſſuage of the ſaid *Jane* in *London*, in the Tenure of *William Fitz Williams* Eſquire, if then the ſaid *Richard Rainford* in his life time purchaſe to the ſaid *Iane*, her Heirs and Aſſigns, Lands and Tenements, of good Right and Title, and of as good value as the money raiſed upon the alienation of the ſaid Meſſuage amounts unto, or leave to the ſaid *Iane* after his deceaſe, as Executrix, or by Legacy, or other good aſſurance, ſo much money as he ſhall receive or have upon the ſaid Sale, that then the Obligation ſhall be void, after which the ſaid *Richard Rainford* married with the ſaid *Jane*, and the ſaid *Richard* and *Jane* ſold the ſaid Meſſuage in Fee by Fine, for 320 *l.* received by the ſaid *Richard Rainford*, after which the ſaid *Iane died*, no Lands being purchaſed to the ſaid *Iane* by the ſaid *Richard*, and the ſaid *Richard* yet living.

Michaelmas Term, 37, & 38. Eliz.

Sawyer *verſus* Hardy.

1. IN an Ejectione firmæ, by Chriſtopher Sawyer Plaintiff, againſt Edmund Hardy Defendant, for a Meſſuage in S. Martins, upon a Demurrer, the caſe was this.

A Leaſe was made of the ſaid Meſſuage to one *Margaret Sawyer* for 40. years, upon Condition, that if the ſaid *Margaret* ſhould ſo long continue a Widow, ſhe ſhould dwell and ſtay in the ſame Meſſuage, the ſaid *Margaret* continued a Widow, and dwelt in the ſame houſe all her life, and died during the ſaid Term of 40. years, making the Plaintiff her Executor, and by award the Plaintiff had Judgment to recover: For by Popham, Gawdy, and Clench, this now was no Condition nor Limitation, for it hath no certain concluſion upon the (that if) to wit, that then the Term ſhall continue, or that ſhe ſhall pay ſo much, or otherwiſe what the concluſion ſhall be, none can imagine: As if ſuch a Leaſe be made upon condition, that if the Leſſee does ſuch a thing without other concluſion, it is a good Leaſe for 40. years, for none can imagine what the concluſion ſhall be in ſuch a caſe, or that then the Leaſe ſhal be void, or that he ſhall re-enter, or that the Leſſee ſhall forfeit ſo much, or what ſhall happen upon it, for which incertainty it ſhall be taken as a void Clauſe.

But by Popham, if it had been Sub conditione ſi tamdiu vixerit, it had been good to determine the Leaſe, but it is otherwiſe of the word (quod ſi) for the incertainty as before.

And they all agreed, that if the Leaſe had been for 40. years Si tamdiu ſola viveret & inhabitaret in eodem Meſſuagio, that the Leaſe had been determined by her marriage, or death. In the ſame manner, as if it had been Si tam diu vixerit. And ſo in truth had been the caſe if it had been well pleaded, but by pleading the advantage therof was loſt, and the truth not diſcloſed.

But by Popham, If a Leaſe be made for 40. years, if he ſhall dwell in the ſame for his life, there it is good for 40. years, upon performance of the Condition, the diverſity appeareth, *to wit*, where it is, if he ſhall dwell there during the Term, and where it is, if he ſhall inhabit there during his life.

Goodale *verſus* Wyat.

2. IN an Ejectione firmæ by Cuthbert Goodale Plaintif, againſt John Wyat Defendant, for a Meadow in Aylesbury, in the County of Buck. called Diggelmore, upon a ſpeciall Verdict the caſe was this.

See this Caſe *Coke lib. 5. fol. 95, 96.* by the name of *Goodales* caſe.

Sir *John Packington* Knight, enfeoffed therof one *Ralph Woodliff*, to have and to hold to him and his Heirs, upon condition, that if the ſaid Sir *John* within a year after the death of the ſaid *Ralph*, pay to the Heirs, Executors, or Adminiſtrators of the ſaid *Ralph*, the ſumm of a 100. marks of lawfull money, that then the ſaid Feoffment and Seiſin made therupon ſhall be void; *Ralph Woodliff* made a Feoment over to others therof, and died inteſtate, and Adminiſtration was committed to *Anne* his Wife, and *Drew Woodliff* his Son and Heir, who gave a Warrant of Attorney to *Thomas Goodale* then ſeiſed of the ſaid Meadow by mean conveyances, for the receit of the ſaid 100. marks, with Covenant that none of them ſhall do any act, or thing that ſhall be preiudiciall or hurtfull to the ſaid *Thomas Goodale*, for the receiving and enjoying of the ſaid ſumm, after which it was certified to the ſaid Sir *John Packington* by the

the ſaid *Goodale* that this Warrant was made to him: After which it was agreed between the ſaid Sir *Ioh Packington* & *Drew Woodale*, that the ſaid *Tho. Drew* ſhall have but 32 *l.* of the ſaid 100. marks, wherupon the ſaid Sir *John Packington* within a year after the death of the ſaid *Ralph Woodliff* paid to the ſaid *Drew Woodliff* the 100. marks, and preſently the ſaid *Drew* delivered to the ſaid Sir *John* all the 100. marks but 32 *l.* And the Verdict ſtands upon this point, whether the 100. marks were well paid, or not.

And by Popham and Gawdy this was meerly a fraud which ſhall never prejudice a third perſon, for if it be agreed between the Diſſeiſee and I. S. that a ſtranger ſhall diſſeiſe the Tenant of the Land, and enfeoff the ſaid I.S. to the intent that the Diſſeiſee ſhall recover againſt him, this Recovery ſhall bind the ſaid I.S. but not him who was diſſeiſed, and yet he who recovered had a good Title, and paramount the other, but he ſhall not come to that to which he had good cauſe of Action and Title by fraudulent means, to the prejudice of a third perſon, not party to this fraud.

And it was ſaid further, that to pay money, and take it away again preſently before that it is purſed up by re-delivery, is not properly a payment, but rather a colour of payment.

And by Fennor and Popham, the force of a Deed of Feoffment once effectuall, cannot become void or of no effect, nor the Livery therupon by ſuch manner of words. And it is not like a Bargain of Goods, or an Obligation, or a Leaſe for years, which by ſuch words may be diſſolved and made to be of no force or effect, becauſe that as by the ſealing a bare Contract, it may be made perfect and effectuall without other circumſtances, ſo may it be defeated by ſuch bare means without other circumſtance: But ſo it is not in caſe of an Inheritance or Free-hold, which cannot be effectual by the bare delivery of a Deed, unleſſe that Livery be made therupon.

And all agreed, that as this caſe is, notwithſtanding the Feoffment made over by the Father, the money might have been paid to the Heir to perform the Condition, if they had been duly paid, and without Covin, and that the words had been apt to have defeated the Eſtate.

In which caſe a Condition ſhall be performed to an Aſſignee, and not to the Heir.

But by Popham and Clench, If a Feoffment be made to one upon condition of payment of money to the Feoffee, his Heirs or Aſſignes and the Feoffee makes a Feoffment over, and dies, the money ought to be paid to the Feoffee who is the Aſſignee, and not to the Heir, for there (Heir) is not named but in reſpect of the Inheritance which might be in him, but here he is named as a meer ſtranger to it.

Bartons *Caſe*.

3. IN a Writ of Error ſued in the Kings Bench by Randall Barton, upon a Fine levied at Lancaſter, 7 Eliz. of Land in Smithall, and elſe where in the County of Lancaſter, by Robert Barton Eſquire, to Leven and Browndo, where this Writ was brought by the ſaid Randall as Heir in tail to the ſaid Robert, to wit, Son of Ralph, Brother of the ſaid Robert. The Defendant plead a Recovery in Bar therof had after the Fine, in which the ſaid Robert was vouched, who vouched over the common Vouchee: And by all the Court this common Recovery with ſuch double Voucher (which is the common aſſurance of Lands) is a Bar by reaſon of the Voucher, to every manner of right which the Vouchee, or his Heir by means of him is to have to this land, which is paramount the Recovery. And ſo it is of every manner of way wherby they are otherwiſe to come to the Land before the Recovery. And if the recovery be erroneous, it remains a good Bar untill it be avoided by error. But if the Recovery be void, or the Voucher not warranted to

be, purſuing the appearance of the Tenant, but precedent to it, as was pretended, and ſo no Tenant to warrant the Voucher when the Voucher was made, the Recovery ſhall be no bar in ſuch a caſe; and the caſe here was informed to be this, for the Writ of Entry bears date 1. Mart. 7 Eliz. returnable Die Lunæ in 4. ſeptimana quadrageſſimæ propter futur. and the Voucher was made in 4. ſeptimana quadrageſſimæ, 7 Eliz. the ſaid firſt day of March, being the firſt week of this Lent, 7 Eliz. And upon this it was inferred that the Tenant was not to appear untill Munday in the fourth week of Lent, 8 Eliz. which is a long time after that the Voucher appeared and vouched over.

But by the whole Court the Original Writ ſhall be taken as it is written, to be returnable on Munday, in the fourth week of the ſame Lent, 7 Eliz. for it ſhall be taken as it is written ſhortly, moſt beneficially that it can be to make the Recovery good. And if it had been written Proxime, it ſhould refer to the week before, and ſo good. And if the word (Futur.) had been written at large (Futura) it alſo ſhall refer to Septimana, and therfore being written briefly it ſhall refer as it may beſt do to make the Recovery good. But if it had been in Quarta ſeptimana proximæ quadrageſſimæ at large, then the word Proxime ſhall refer to Quadrageſſimæ becauſe of the caſe: But if it had been Proxima it ſhall refer to Septimana, becauſe alſo of the caſe; But here as the caſe is, it ſhall be a good reference to make the words Tunc proxima futur. to ſhew what fourth week of Lent, to wit, that next enſuing the firſt day of March. As if a man be bound by Obligation, bearing date the firſt day of March, to pay the 10. day of March then next enſuing, this ſhall be taken the 10. day of this March, becauſe this is next enſuing the firſt day.

Paramor *verſus* Verrald.

4. IN Treſpaſſe of Aſſault and falſe Impriſonment, by Robert Paramor againſt John Verrold, and others, ſuppoſed to be done at ſuch a Pariſh and Ward in London, the 20. day of May, 35 Eliz. The Defendants juſtifie by reaſon of an Execution upon a Recovery in the Court of Sandwich, within the Cinque-Ports, Debt, and traverſe Abſque hoc, in that they were guilty in London, &c. The Plaintiff reply and maintain the Aſſault and Impriſonment, as it is ſaid, and traverſes Abſque hoc quod habetur aliquod tale Recordum loque'æ prour, the Defendants have alledged, Et hoc paratus eſt verificare per Recordum illud, and upon this the Defendants demurred in Judgment: And per Curiam the Defendants plea Prima facie was good, becauſe it was a ſpeciall manner of Juſtification, which cannot be pleaded and alledged to be in any other place then where it was done, in the ſame manner as if they had juſtified by force of a Capias directed to the Sheriff of another County, then where the occaſion brought, or by Warrant of a Juſtice of Peace of another County, for matter of the Peace, and the like, which are not like to the caſe of Partridge, who was beaten in the County of Glocester by Sir Henry Pole, for which he brought his Action in London: And Sir Hen. Pole would have juſtified by Aſſault of the Plaintiff in the County of Glocester, with a traverſe that he was not guilty in London: But it was then ruled in this Court, that he could not do it to ouſt the Plaintiff to ſue in London, but in ſuch a caſe he might have alledged that the Aſſault was done in London, becauſe it was alſo a thing tranſitory, of which they ſhall take notice there, and ſo help himſelf if the matter had been true.

But in the caſe at the Bar, if the ſpeciall matter alledged in the forraign County be falſe, as here, the Plaintiff may maintain his Action and traverſe the ſpecial matter alledged by the Defendant: And ſo a traverſe in ſuch a caſe may be upon a Traverſe when falſity is uſed, to ouſt the Plaintiff of that benefit which the Law gives him.

Hillary Term, 38 Eliz.

Wood *verſus* Matthews.

1. IN a writ of Error brought by Owen Wood, againſt Griffeth Matthews, upon a judgment given in the common Pleas, the caſe was briefly thus. The Iſſue in the Common Pleas was, whether one were taken by a *Cap. ad ſatisfaciendum*, or not, and upon the triall therof at the *Niſi prius*, the Jury found for the Plaintiff in this Action, *to wit*, that the party was not taken by the ſaid *Capias*, and upon the back of the Pannell entred *dicunt per Quer.* but on the back of the *Poſtea* the Clark of the Aſſiſes certified the Pannell thus, *to wit*, That the Jury ſay, that no *Capias* was awarded, which was otherwiſe then was put in Iſſue, or found by the Jury; and the Roll of the Record was according to the *Poſtea*, and upon this Judgment given for the ſaid *Matthew* then Plaintiff, upon which (amongſt other Errors) this variance between the Iſſue and Verdict was aſſigned for Error, and after deliberation had upon this point, and this matter alledged by the Defendant in the Writ of Error, and certified out of the Common Pleas, the Court awarded as to this point that the Record ſent up out of the Common Pleas by the Writ of Error, ſhall be amended, according to that which was endorſed on the back of the Pannell, for the endorſement upon the Pannell is the Warrant for the certifying of the *Poſtea*, and ſo this Warrant over to him that makes the Entry in the Roll: And therfore whereas it was alledged that the Poſtea was amended in the Common Pleas after the Record removed, it was holden to be well done there; for although the Record were removed by the Writ of Error, yet the Niſi prius, the Poſtea, and the like remain ſtill there, as it is of the Warrant of Attorney, and the like: And if the Poſtea had not been amended there, but ſent up with that which was endorſed upon the Pannel, all ſhal be amended here according to that which was indorſed upon the Pannel, and according to this there was a Preſident ſhewn Tr. 35. H. 8. between Whitfeild and Wright, where the Iſſue was, whether a quantity of Grain were delivered between two Feaſts, and endorſed upon the Pannel (Dicunt pro quær.) and yet the Poſtea certified (and the Rolls alſo made) that the delivery was made ad feſta, and upon this matter alledged in Banco Regis, and the Error in this point aſſigned and certified out of the Common Pleas, the Record removed by the Writ of Error was by award of the Court amended, and the word (Ad) razed out, and the word (Inter) written in lieu of it, according as it appeareth it ought to have been by the Note upon the back of the Pannel. And the like amendment was made lately in the Chequer Chamber, upon Error brought there upon a Judgment given in Banco Regis, where the Indorſment upon the back of the Writ was (pro Quer.) and the Poſtea and Roll was, that the Plaintiff was guilty, and there amended the laſt Term.

Slanings *Caſe.*

2. NIcholas Slaning of Bickley was ſeiſed in his Demeſn as of Fee, of the Manor of Bickley, and of a Mill in Walkhampton, in the County of Devon, called a blowing Mill, and of another Mill there called a knocking Mill, and of an acre of Land there alſo, and of divers other Manors and Lands in the ſaid County of Devon, the ſaid Mills and acres of Land in Walkhampton, then being in the poſſeſſion of one Peterſeild, and Atwill, of

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an Eſtate for divers years then to come, and being ſo ſeiſed, he with Margaret his Wife levied a Fine of the ſaid Mannor of Bickley, and of other Lands, omitting the ſaid Lands in Walkhampton, to certain Cauzees, who rendzed the ſame back again to the ſaid Margaret Slaning for her life, with the remainder over to the ſaid Nicholas, and his Heirs: After which the ſaid Nicholas by Indenture dated 30. Octob. 21 Eliz. gave and enſcoffed all the ſaid Mannors and Premiſſes to John Fits and others, and the Heirs of the ſaid Fits, to the Uſes, Proviſoes, and Limitations mentioned in the ſaid Indenture, which was to the uſe of himſelf, and the Heirs Males of his body, by any other Wife, the remainder to Nicholas Slaning of Newton Ferries, and the Heirs Males of his body, with divers remainders over, with this Proviſo, to wit, Provided, and it is the intent of theſe preſents, and of the parties thereunto, that the ſaid John Slaning, and the Heirs Males of his body, or the ſaid Nicholas Slaning of Newton-ferries, and the Heirs Males of his body, in whomſoever of them the Inheritance in tail of all the Premiſſes ſhall happen to be by force of theſe preſents, ſhall pay to Agnes the Daughter of the ſaid Nicholas Slaning of Bickly, 200 l. or ſo much therof as ſhall be unpaid at the time of the death of her ſaid Father, according to the intent of his laſt Will, with a Letter of Attorney to it, by which he ſendains John Hart and Robert Fort, joyntly and ſeverally his Attorney to enter into the ſaid Mannor of Bickley, Walkhampton, &c. and all other the Lands, Tenements, and Hereditaments, in the ſaid Indenture mentioned, and poſſeſſion for him to take, and after ſuch poſſeſſion taken for him and in his name, to deliver full poſſeſſion and ſeiſin of the Premiſſes to the ſaid John Fits, &c. according to the form and effect of the ſaid Indenture, whereupon poſſeſſion and ſeiſin was given of all but that which was in poſſeſſion of the ſaid Peterfield and Atwill: And the ſaid Pererfield and Atwill, nor either of them never attorned to the ſaid Grant: After which Nicholas Slaning of Bickly made his laſt Will, by which deviſed to the ſaid Agnes his Daughter 200 l. to be paid in form following, and not otherwiſe, to wit, 100 l. therof, in theſe words, On that day twelvemonth next after the day of his death, and the other 100 l. that day twelvemonth next after, &c. and made the ſaid John Slaning his Executor, and afterwards, to wit, the 8. day of April, 25 Eliz, died without Iſſue Male of his body, the ſaid Agnes took to Husband one Edmund Marley, and upon the 8. day of April, 26 Eliz. the ſaid John Slaning paid the firſt 100 l. to Agnes then being living, and upon the 8. and 9. daies of April, 27 Eliz. Nicholas Slaning of Plumpton, Son and Heir of the ſaid John Slaning, who died (in the mean time) an hour before the Sun ſet, and untill the Sun was ſet, came to the Houſe where the ſaid Edmund and his Wife inhabited in London, and tendred the laſt 100 l. and that neither the ſaid Edmund nor Agnes his Wife were there to receive it, but that the ſaid Edmund voluntarily abſented himſelf, becauſe he would not receive the 100 l. and that therupon the Wife of the ſaid Edmund died, having Iſſue two Daughters, the Lands being holden by Knights-ſervice in Capite, and the ſaid Daughters being yet within age, and all this being found by Office, by the opinions and reſolutions of Popham and Anderſon, and the reſt of the Councel of the Court of Wards, the ſaid Heirs now in Ward ſhall have nothing but that which doth not paſſe by the conveyance to John Fits and his joynt Feoffees, which was only that which was in the poſſeſſions of Peterfield and Atwill, and that the Livery was good of the reſt, albeit the Attorny did nothing of that which was in Leaſe, notwithſtanding the words of the Warrant, that they ſhould enter into all, and then ſhall make the Livery.

And they agreed, that the Condition doth not bind neither the ſaid John Slaning nor Nicholas his Son, becauſe they had not all the Land according to the

the purport of the Condition, which was, that he who had all therof ſhould pay the 200 l. wheras here that which was in the poſſeſſion of Peterfeild and Atwill did not paſſe to them for want of Attornment, for a Condition ought to be taken ſtrictly.

And further the payment was referred by the Indenture to be according to the Will, or by the Will, and the 200 l. was deviſed as a Legacy, which ought to be paid but upon demand, and not at the peril of the Executor, and therfore the nature of the payment of it is altered by the intent of the Will, and being not demanded, there is no default in the ſaid Nicholas Slaning of Plumpton, to prejudice him of his Land, if it had been a Condition, for then it ſhall be but a Condition to be paid according to the nature of a Legacy upon demand, and not at the peril of the party. And whether the word twelvemonth ſhall be taken for a year, or twelvemonths, according to 28. daies to the month, as it ſhall be of eight or twelve months, or the like. And they agreed that in this caſe it ſhall be taken for the whole year, according to the common and uſuall ſpeech amongſt men in ſuch a caſe, and according to this opinion Wray (who is dead.)

Anderſon and Gawdy made their Certificate to the late Chancellor Sir Chriſtopher Hatton, in the ſame caſe then being in the Chancery, and a Decree was made accordingly.

And many were of opinion, that by his abſence, by ſuch fraud he ſhall not take advantage of the Condition, being a thing done on purpoſe, if it had been to be performed at his peril.

Kellies *Caſe*.

William Kelly and Thomaſine his Wife, were ſeiſed of certain Lands in S. Eth, in the County of Cornwall, called Karkian, to them and to the Heirs of their two bodies between them lawfully begotten, by the Gift of one William Dowmand Father of the ſaid Thomaſine, 11 H. 8. a long time after which Gift, to wit, 25 H. 8. A Fine Sur conuſance de droit come ceo que il ad per, was levied by Peter Dowmand, Son and Heir of the ſaid William Dowmand to William Kelley of the Manor of Dowmand, and of a 100. acres of Land, 300 acres of Meadow, 300. acres of Paſture, and a 1000. acres of Furze and Heath in Dowmand, S. Eth. Treviley, and divers other Towns named in the Fine, who rendred the ſame back again to the ſaid Peter in tail, with diverſe Remainders over, and this Fine was with proclamations according to the Statute, after which the poſſeſſion of Karkian continued with Kelly and his Heirs, according to the firſt Intail; and the Manor of Dowmand, and the Remainder of the Lands in theſe Towns, which were to the ſaid Peter Dowmand to him and his Heirs according to the render, untill nine years paſt, that by Niſi prius in the Country upon the opinion of Manwood late chief Baron, the Land called Karkian, was recovered againſt the Heir of the ſaid William Kelly, by virtue of the ſaid Fine and Render, becauſe all the Land which the ſaid Peter Dowmand, and the ſaid William Kelly alſo had in all theſe Towns named in the Fine, were not ſufficient to ſupply the Contents of acres compriſed in the ſaid Fine: And what the Law was in this caſe, was referred to the chief Juſtices, the Maſter of the Rolls, Egerton, and the now chief Baron out of the Chancery, who all agreed upon all this matter appearing, that nothing ſhall be ſaid to be rendred but that which indeed was given by the Fine. and Karkian does not paſſe to the ſaid William Kelly by the Fine, for as to it the Fine is but as a releaſe of Peter to him, and therfore ſhall not be ſaid to be rendred to the ſaid Peter by the Fine, where no matter appeareth, wherby it may appear that it was the intent of the parties that this ſhall be rendred. And therfore Popham ſaid, that by ſo many Fines which have been levied in ſuch a manner, and to ſuch who have Land in the ſame Towns where the Conuſance hath been (conſidering

ing that alwaies more Land is compriſed in Fines by number of acres, then men have, or is intended to paſſe) by them at ſome time, or in ſome age, it would have come in queſtion if the Law had been taken as Manwood took it, but in all ſuch caſes the Poſſeſſion hath alwaies gone otherwiſe, which ſhews how the Law hath been alwaies taken in ſuch caſes.

And therfore if a man be to paſſe his Manor of D. to another by Fine Executory, and he levy the Fine to him by the name of the Manor of D. and of ſo many acres of Land in D. and S. being the Towns in which the Manor lies, after which the Conuzor purchaſeth other Lands in theſe Towns, the Fine before the Statute of Uſes ſhall not be executed of theſe Lands purchaſed after the Conuſance, and the Fine ſhall work to theſe which he had power and intent to paſſe, and no further.

And it ſeemed to them, that an Uſe may be averred without Deed upon a Fine ſur Render. And all agreed that if there had been a Deed to have declared the purport of the Fine, that the Fine ſhall not be taken to extend further then is compriſed in the Deed. And what is the cauſe therof, the Deed or the intent of the parties? and none can ſay but that it is the intent of the parties, and not the Deed, and the intent may as well appear without the Deed, as with it, albeit it be not ſo concluſive by Parole as by Deed.

And therfore ſuppoſe I have 100. acres of Land in a Cloſe in D. and I. S. hath another 100. acres in the ſame Cloſe and Town, and I. S. hath a 100. acres of Land in the ſame Town out of this Cloſe, and my intent is to levy a Fine to I.S. of the whole Cloſe by the name of 200. acres of Land, with a Render as before, and I levy it accordingly, ſhall the Render enure to the Land, which I.S. had in the ſame Town? It is cleer that it ſhall not, although it be without Deed: why then ſhall the Fine here be taken to work rather to the Land called Karkian, then to any other Lands which any other had in the ſame Towns, when it appeareth plainly, that it never was the intent of the parties, that the Fine ſhould extend to theſe Lands called Karkian, and it was decreed in Chancery accordingly.

Hall *verſus* Arrowſmith.

4. IN the caſe between Hall and Arrowſmith, it was agreed by the whole Court in the Kings Bench, That if a Copyholder for life hath licence to make a Leaſe for three years, if he ſhall live ſo long, and he makes a Leaſe for three years without ſuch a Limitation, that yet this is no forfeiture of his Eſtate, becauſe the operation of Law makes ſuch a Limitation to the Eſtate which he made, to wit, that it ſhall not continue but for his life, and then ſuch an expreſs Limitation in the caſe where the Law it ſelf makes it is but a meer trifle; and yet if a Leſſee for life makes a Leaſe for years, and he in the Reverſion confirm it, it remains good after the death of the Tenant for life, but this then ſhall be as if it had been made by him in the Reverſion himſelf, and ſhall be his Leaſe: But if the Leaſe there had been made determinable upon the life of Tenant for life, the confirmation therof by him in the Reverſion will not help him after the death of him who was Tenant for life, Cauſa patet.

But in the principall caſe, if the Copyholder had had an Eſtate in Fee by Copy, it had been a forfeiture of his Eſtate to make an abſolute Leaſe, becauſe in that caſe he does more then he was licenſed to do.

And they agreed that ſuch a licence cannot be made to be void by a Condition ſubſequent to the execution therof, to undo that which was once well executed. But there may be a Condition precedent united to it, becauſe in ſuch a caſe it is no licence untill the Condition performed; but the licence before mentioned is not a conditionall licence; but a Licence with a Limitation, and therfore hath not been of force, if the Limitation which the Law makes in this caſe had not been, and the Limitation in Law ſhall be preferred before the Limitation in Deed, where they work to one and the ſame effect, and not different.

Arthur Johnſons *Caſe*.

5. ARthur Johnſon was poſſeſſed of a Term for years, and ſo poſſeſſed, aſſigned this over to Robert Waterhouſe, and John Waterhouſe, being Brothers to the Wife of the ſaid Johnſon, to the uſe of the ſaid Wife; the ſaid Johnſon dies, and makes his Wife his Executrix, after which the ſaid Wife takes Robert Witham to Husband, who takes the Profits of the Land during the life of his ſaid Wife, the Wife dies Inteſtate, her ſaid Brothers being next of kin to the ſaid Wife, took adminiſtration as well of the Goods of the ſaid Wife, as of her firſt Husband. And whether the ſaid Waterhouſes, or the ſaid Witham ſhall have this Leaſe, or the uſe therof, was the queſtion in the Chancery, and therupon put to the two chief Juſtices, upon which they and the chief Baron, and all the other Juſtices of Serjeants-Inne in Fleetſtreet, and Beamont alſo were cleer in opinion, that the ſaid Adminiſtrators had now as well the Intereſt as the Uſe alſo of the ſaid Term, as well in Conſcience as in Law, and that they had the uſe as Adminiſtrators to the ſaid Wife, and that the ſaid Witham ſhall not have it, becauſe it is as a thing in Action, which the Adminiſtrators of the Wife alwaies ſhall have and not the Husband. As if an Obligation had been made to the uſe of the Wife: And this opinion was certified accordingly to the Lord Keeper of the great Seal of England, and it was ſo decreed.

Taunton *verſus* Barrey.

6. IN an Ejectione firmæ brought by Giles Taunton Plaintiff, in the King's Bench, againſt Giles Barrey Defendant, the Caſe was thus.

John Coles Eſquire, made a Leaſe of the Lands in queſtion to the Father of the ſaid *Barrey*, for divers years, depending upon the life of the Leſſee, and of the ſaid Defendant, and of the Survivor of them, upon condition that the ſaid Father ſhould not alien without the conſent of the ſaid *Coles* & his heirs, after which the ſaid Father deviſed the Term to the ſaid Defendant and died, making his Executor, who aſſented; And the queſtion upon this point found upon a ſpeciall Verdict, was, whether upon the matter the Condition were broken; and by the opinion of the whole Court adjudged that it was, for in ſuch a caſe he ought to have left it to his Executor, without making any Deviſe of it, for the Deviſe is an Alienation againſt him, and therfore it was agreed that the Plaintiff ſhall recover Term, 37 Eliz. Rot. between Roper and Roper.

Michaelmas

Michaelmas Term, 38, & 39. Eliz.

Everets *Caſe*.

1. THis Caſe was moved by the chief Juſtice to the other chief Juſtices at Serjeants-Inne in Fleetſtreet, concerning one Everet, who before was attaint for ſtealing of a Horſe, & reprieved after Judgment, and Indited again for ſtealing another Horſe before this Attainder: And the Vicar of Pelton, in the County of Somerſet was Indited as acceſſary before this Felony, for the procurement of it; And Everet being again Indited upon this laſt Inditement, did not plead that he was formerly Indited of another Felony, &c. but acknowledged the Inditement whereby the Acceſſary was Arrained, tried, and found guilty, and had his Judgment alſo as the principall, but the Execution of the Acceſſary was reſpited: And now moved whether upon this matter it ſhall be fit to execute the Acceſſary, the principall being executed.

And it ſeemed convenient to all the Juſtices and Barons that he ſhall be executed, and that the matter was cleer in this caſe, becauſe the principall did not take advantage of his firſt Attainder by way of Plea, but acknowledged the Deed, in which caſe the Acceſſary may well be Arraigned: But if the principall had pleaded his former Attainder, whether now he ſhall be put to anſwer for the benefit of the Queen, having regard to this Acceſſary, who otherwiſe ſhall go quit, becauſe there was not any principall, but he who was formerly attainted.

And it ſeemed to Popham and ſome others, that it ſhall be in the ſame manner, as if the ſame perſon ſo formerly attainted ſhould be tried now for Treaſon, made before his Attainder, as appeareth by 1 H. 6. 5. becauſe it is for the advantage of the King in his Eſcheat of the Land: and notwithſtanding, that it is moved by Stamford in his Pleas of the Crown, it ſeemed to Popham that there was no diverſity where the Treaſon was made before the Felony of which he is attainted, and where after and before the Attainder; And by the ſame reaſon that he ſhall be again tried for the benefit of the King in this caſe becauſe of the Eſcheat, by the ſame reaſon in this caſe here, becauſe of the forfeiture which accrueth to the Queen by the Attainder of the acceſſary, and for the Juſtice which is to be done to a third perſon, who otherwiſe by this means ſhall eſcape unpuniſhed.

But he agreed, that the party Attaint ſhall not be again Arraigned for any other Felony done before the Attainder, in caſe where no Acceſſary was touched before the Statute of 8 Eliz. cap. 4. he who is convict of Felony, and hath his Clergy after his purgation made, ſhall be Arraigned for another Felony done before the conviction, if it be ſuch for which he cannot have his Clergy, and was not convicted or acquitted of the ſame Felony before the Attainder: But upon this Statute it appeareth, that he who ſhall have his Clergy in ſuch manner, ſhall not be drawn in queſtion for any other Felony done before his Attainder, for which he might have his Clergy.

And of this opinion (as Clark and others of the Juſtices ſaid) were all the Juſtices in the time of Wray. And as to the Statute of 18 Eliz. cap 7. It is not to be underſtood but that he who hath his Clergy, and delivered according to this Statute, ſhall be yet arraigned for any other Felony done before his former Conviction or Attainder, if it be ſuch for which he cannot have his Clergy; for the words are, That he ſhall be put now to anſwer, &c. in the ſame manner as if he had been delivered to the Ordinary, and had made his Purgation, any thing in this act to the contrary notwithſtanding.

Pollard

Pollard *verſus* Luttrell.

2. IN an Ejectione firmæ between Pollard and Luttrell for Lands in Hubury and Liſtock, upon the Title between the Lord Audeley and Richard Audeley, it was agreed by the chief Juſtices, that if the Diſſeiſor levy a Fine with Proclamations according to the Statute of 4 H. 7. and a ſtranger within five years after the Proclamations enter in the right of the Diſſeiſee, without the privity or conſent of the Diſſeiſee, that this ſhall not avoid the Bar of the Fine, unleſſe that he aſſent to it within the five years, for the words of the Statute are, ſo that they purſue their Title, Claim, or Intereſt by way of Action, or lawfull Entry within five years, &c. and that which is done by another without their aſſent, is not a purſuing by them according to the intent of the Statute, for otherwiſe by ſuch means againſt the will of the Diſſeiſee, every ſtranger may avoid ſuch a Fine, which was not the intent of the Statute.

Mountague *verſus* Jeoffreys *and others.*

3. IN Treſpaſſe by Edward Mountague Plaintiff, againſt Richard Jeoffreys and others Defendants, for a Treſpaſſe done in certain Lands called Graveland, in Hailſham in the County of Suſſex, the Caſe upon a ſpecial Verdict was thus.

Sir *John Jeoffreys* late chief Baron, being ſeiſed in his Demeſnes as of Fee (amongſt others) of the ſaid Land called *Graveland* having Iſſue but one only Daughter, by his Will in writing deviſed all his Land of which he was ſeiſed in fee (except the ſaid *Graveland*) to his ſaid Daughter for 21. years, *&c.* and the ſaid Land called *Graveland* (which was then in Leaſe for divers years, to one *Nicholas Cobb*, which years at the time of the death of the ſaid Sir *John Geoffreys* continued) he deviſed to the ſaid *Richard Jeoffreys* his Brother, and his Heirs, and by the ſame Will he diſpoſed divers Legacies of his Chattels, and the Remainder he gave to his ſaid Daughter, and made her Executrix of his ſaid Will; after which the firſt Wife of the ſaid Sir *John Jeoffreys* being dead, he covenanted with Mr. *George Goring* to take the Daughter of the ſaid *George* to Wife, and covenanted with the ſaid *George* (amongſt other Lands) to aſſure the ſaid Land called *Graveland* to the ſaid *George Goring* and *Richard Jeoffreys*, and their Heirs, to the uſe of the ſaid Sir *John Jeoffreys*, and *Mary Goring* Daughter of the ſaid *George*, and the Heirs of the ſaid Sir *John Jeoffreys*, by a certain day, before which day the marriage being had, the ſaid Sir *Io: Jeoffreys* made a Deed and ſealed it, and delivered it, containing a Feoffment of the ſaid Land called *Graveland* (amongſt others) to the ſaid *George Goring* and *Richard Jeoffreys*, and their Heirs, to the Uſes aforeſaid, in performance of the ſaid Covenants, with a Warrant of Attorney to make Livery accordingly, and the Attorney made Livery in other parts of the Land, and not in *Graveland*, and this was in the name of all the Lands compriſed in the Deed, and the ſaid *Nicholas Cobb* never attorned to this Deed; After which Sir *John Jeoffreys* interlined in the ſaid Will, that the ſaid *Mary* then his Wife ſhould be joynt Executrix with his Daughter: And in the Legacy of the reſt of his Goods, *&c.* he interlin'd the ſaid *Mary* his Wife to be Joynt-tenant with his ſaid Daughter, without other publication therof; and afterward the ſaid Sir *John* died, the ſaid Daughter being his Heir, who took to Husband the ſaid *Edward Mountague*.

4. IN Treſpaſſe, the Plaintiff ſuppoſeth the Treſpaſſe to be done in the breaking of his Houſe and Cloſe in ſuch a Town, the Defendant juſtifies in a Houſe and Cloſe in the ſame Town, and ſhews which, to put the Plaintiff to his new Aſſignment, to which the Plaintiff replied that the Houſe and Cloſe of which he complains is ſuch a Houſe, and gives it a ſpeciall name, upon which the Defendant demurs, and adjudged that the Plaintiff take nothing by his Writ: for albeit a Houſe may have a Curtilage which paſſeth by the name of a Meſſuage with the Appurtenances, yet this ſhall not be in this caſe, for by the Bar the Plaintiff is bound to make a ſpeciall demonſtration in what Meſſuage and what Cloſe he ſuppoſeth the Treſpaſſe to be done, as to ſay that the Houſe hath a Curtilage, the which he broke, and it ſhall not be taken by intendment that the Meſſuages had ſuch a Curtilage to it, if it be not ſpecially named.

Fennors *Caſe*.

5. IN Treſpaſſe brought by Fennor in the common Bench, againſt for breaking his Cloſe in, &c. the Defendant pleads a Bar at large, to make the Plaintiff aſſign the place in certain, where he ſuppoſeth the Treſpaſſe to be done, the Plaintiff therupon alledgeth that the place where he complaineth is ſuch, &c. and ſheweth in certain, another then that in which the Defendant juſtifies, the Defendant avers that the one and the other are all one, and known by the one name and the other, and therupon the Plaintiff demurs, and adjudged there for the Plaintiff, becauſe that in ſuch a caſe upon ſuch a ſpeciall aſſignment, it ſhall be taken meerly another then that in which the Defendant juſtifies, in as much as the Plaintiff in ſuch a caſe cannot maintain it upon his evidence given, if the Defendant had pleaded not guilty to this new Aſſignment, that the Treſpaſſe was done in the place in which the Defendant juſtifies, although it be known by the one and the other name, and that the Plaintiff hath good Title to it, becauſe that by his ſpeciall Aſſignment, ſaying, that it is another then that in which the Defendant juſtifies, he ſhall never after ſay, that it is the ſame in this Plea, for it is meer contrary to his ſpeciall Aſſignment: And upon this a Writ of Error was brought in the Kings Bench, and the Judgment was there affirmed this Term for the ſame reaſon, Quod nota.

Scot *verſus Sir* Anthony Mainy.

6. IN Debt upon an Obligation of 200 l. brought by John Scot Gent. againſt Sir Anthony Mainy Knight, the Condition wherof being to perform the Covenant compriſed in an Indenture of Demiſe made by the ſaid Sir Anthony to the ſaid Plaintiff, of his Capitall Meſſuage in Holden with the Lands to it belonging, &c. amongſt which Covenants one was, that wheras by the ſame Indenture he had demiſed it to him for 21. years, that the ſaid Sir Anthony covenanted with the ſaid John Scot, that the ſaid Sir Anthony from time to time, during the life of the ſaid Sir Anthony, upon the ſurrender of this Demiſe, or any other Demiſe hereafter to be made by the ſaid Sir Anthony, of the ſaid Meſſuages and Lands, and to be made by the ſaid John Scot, his Executors or Adminiſtrators, and upon a new Leaſe to be made ready ingroſſed to be ſealed and offered by the ſaid John Scot his Executors or Adminiſtrators, to the ſaid Sir Anthony, for the like tearm and number of years in the aforeſaid Indenture compriſed for the ſame Rent, &c. to ſeal and deliver to the ſaid John Scot, his Executors and Adminiſtrators. And the ſaid Sir Anthony as to this Covenant pleaded, did not ſurrender, nor offer to ſurrender to him the ſaid Demiſe, nor offer to him any new Demiſe of the Premiſſes, ready engroſſed for to ſeal it for the like Term, &c. as it is in this Covenant.

And for the other Covenants he pleads performance of all; To which the Plaintiff replies, that the ſaid Sir Anthony after the Obligation, and before the Action brought, had rendred the ſaid Meſſuages and Lands by Fine to one Walter Savage and William Sheldon their Executors and Aſſigns for eighty years, from the Feaſt of Eaſter next before the Fine which was Paſch. 36 Eliz. wherby he ſaid, that the ſaid Sir Anthony had diſabled himſelf to renew his Leaſe according to the Covenant, upon which it was demurred in the Commen Bench, and the Judgment given for the Plaintiff, as appeareth, Trin. 37. Eliz. Rot. 2573. And upon this Judgment, a Writ of Error was brought in the Kings Bench and agreed this Term. And it was moved that the Judgment given was erroneous, in as much as the firſt act was to be done by John Scot before the new Leaſe was to be made, to wit, the ſurrender of the former Leaſe, and the drawing of the new one ought to have been done by the Plaintiff, which not being done on his part, the ſaid Sir Anthony is not bound to make the new Leaſe.

And alſo it was moved, that as the caſe is here, the ſaid John Scot might ſurrender to the Defendant, notwithſtanding the intervening of this Leaſe between the Leaſe of the Plaintiff, and the Inheritance of the Defendant, as if a man make a Leaſe for years in poſſeſſion, and afterwards make another Leaſe to a ſtranger, to begin after the end of the former Leaſe, this ſhall not hinder but that the firſt Leaſe may be ſurrendred to him who was the Leſſor, notwithſtanding the ſaid Term intervening.

To which it was anſwered by the Court, that the Plaintiff here need not to make any offer of the ſurrender of his Term to the ſaid Sir Anthony, in as much as the ſaid Sir Anthony hath diſabled himſelf to take the Surrender, or to take the Leaſe according to the purport of the Condition, and by this diſabling of himſelf the Obligation is forfeited, Come per 44 E. 3. 8. and by Littleton alſo, If a man make a Feoffment, upon condition to re-enfeoff him, this is not to be done untill requeſt therof be made by the Feoffor, yet if in the mean time the Feoffee ſuffer a fained recovery of the Land, grant a Rent charge, acknowledgeth a Statute, taketh a Wife, or the like, the Feoffor may re-enter, without requeſt made to re-enfeoff him, and the reaſon is, becauſe that by any of theſe the Feoffee hath diſabled himſelf to perform the Condition in the ſame plight, as he might have done at the time of the Feoffment, in the ſame manner here, for by this render by the Fine, the Reverſion paſſe in right, ſo that the Termor in poſſeſſion attorning to it, they ſhall have the Rent reſerved upon the firſt Leaſe, and therfore the Plaintiff cannot now ſurrender to the ſaid Sir Anthony, but to the Grantees of the Reverſion, and therfore there ſhall be no prejudice to the Plaintiff, becauſe the Defendant was the cauſe of diſabling the Plaintiff to make the Surrender to him. And ſuppoſe it be but a Term to begin at a day to come, yet by this the Obligation is forfeited, becauſe the Obligor hath therby diſabled himſelf to perform the Condition in ſuch a plight as he might have done it when the Obligation was made, wherby the Obligation is preſently forfeited, albeit the Plaintiff never ſurrender nor offer to do it: And therfore the Judgment there was affirmed.

Mounſon *verſus* Weſt.

7. IN an Aſſiſe brought in the County of Lincoln, before Gawdy and Owen, by Thomas Mounſon Eſquire, Demandant, againſt Robert Weſt, Tenant for Lands in Sturton Juxta Stu. The Defendant Weſt pleaded Nul Tenant del Frank-tenant named in the Writ, and if that be not found, then Nul tort, nul Diſſeiſin: And the Aſſiſe found that the ſaid Defendant was Tenant of the Tenements now in Plaint, and put in view to the Recognitors

tors of the Aſſiſe, in manner and form as the Writ ſuppoſeth: And further that the ſaid Weſt therof diſſeiſed the ſaid Mounſon, namely of the Tenements in the will of one Mounſon: And did not find either the words of the Will, nor the Will it ſelf what it was, &c. And the Juſtices of Aſſiſe upon this Verdict upon advice with the other Juſtices, gave Judgment, that the Plaintiff ſhall recover, &c. upon which a Writ of Error was brought in the Kings Bench, where it was moved that the Judgment was erroneous: Firſt, becauſe the Jury have not found that the Defendant was Tenant of the Free-hold, agreeing with the form of the Plea, for the Writ of Aſſiſe doth not ſuppoſe him to be Tenant of the Free-hold, and therfore the Verdict in this point not fully found.

The ſecond Error is, that the Seiſin of the Plaintiff is not required of, according to the charge given to them, as well as the Diſſeiſen, for the charge was that they ſhould enquire of the Seiſen of the Plaintiff, &c. But to both theſe the Court anſwered that the Verdict is well enough, notwithſtanding theſe exceptions, for every Aſſiſe brought ſuppoſeth that there is a Diſſeiſor, and a Tenant named in it, then this Aſſiſe being brought againſt a ſole perſon, ſuppoſeth him to be a Diſſeiſor and Tenant alſo; and therfore the Verdict ſaying, that he was Tenant as the Writ ſuppoſeth, is now as ſtrong in this caſe, as if they had found that he was Tenant of the Free-hold, for the Tenant of the Free-hold ought to be named in the Writ: But if the Aſſiſe had been brought againſt two, or more, ſuch a Verdict had not been good, for it ſufficeth if any of them be Tenant of the Freehold, and then the Writ doth not ſuppoſe one to be Tenant more then another, but ſuppoſeth one Tenant to be named in the Writ. And therfore in ſuch a caſe the finding ought to be ſpeciall, to wit, that ſuch a one is Tenant of the Free-hold, or that there is a Tenant of the Free-hold named in the Writ. But where one only is named in the Writ to be Diſſeiſor and Tenant, it is ſufficient to find as here, for by this it is certainly found that he is Tenant of the Free-hold.

And for the other point, although it be a good direction for the Judges to the Jury, wherby they may the better perceive that there ought to be a Seiſin in him, or otherwiſe there cannot be a Diſſeiſen by the other, yet in Deed he cannot be a Diſſeiſed who was not then ſeiſed: But the Aſſiſe having found the Diſſeiſen the Seiſen in Law, is found included in the Diſſeiſen. But for the point moved, that the Verdict was not perfect, in as much as they found the Diſſeiſen with a Niſi, it ſeemed to Gawdy that the Judgment upon this Verdict was erronious, as where a Verdict in another Action is imperfect, a Venire facias de novo ſhall be awarded to try the Iſſue again: And if Judgment be given upon ſuch a Verdict it is error; ſo here the Verdict in this point being incertain, there ought to have been a Certificate of Aſſiſe to have this better opened: But the three other Juſtices held (as the caſe is) that the Verdict in this point is certain enough, for that which cometh before the Niſi (as it is placed) is meerly nugatory. as in the caſe of the Lord Stafford againſt Sir Rowland Heyward, the Jury found Non aſſumpſit, but if ſuch Witneſſes ſay true (as they believe they did) Aſſumpſit, &c. it was but a meer nugation.

But it ſeemed to Popham, that if the Verdict had been, if the words of the Will do not paſſe the Land, then that he diſſeiſed, and if they paſſe, then that he did not diſſeiſe; there if the words of the Will be not found, the Verdict had been all imperfect, but here the Verdict is full and perfect before the Niſi, &c. and therfore the Judgment was affirmed.

Nolme

Holme *verſus* Gee.

8. A Formedon in Deſcender was brought by Ralph Holme Demandant, againſt Henry Gee and Elizabeth his Wife Tenants, and the Caſe was thus.

Ralph Langley and others gave two Meſſuages and a Garden, with the Appurtenances in *Mancheſter*, to *Ralph Holme* the great Grandfather of the Demandant, and to the Heirs of his body begotten, after which the ſame great Grand-father by Deed indented, dated 20. *September*, 14 *H.* 7. enfeoffed *John Gee* of one of the ſaid Meſſuages, and of the ſaid Garden, rendring yearly to the ſaid great Grand-father and his Heirs 13 *s.* 4 *d.* a year, at the Feaſts of S. *Michael*, and the Annunciation, by equal portions, after which the ſaid *John Gee* died ſeiſed of the ſaid Meſſuages and Garden, and it deſcended to *Henry Gee* his Son and Heir; after which the ſaid great Grand-father by his Indenture, bearing date 6. *Martii*, 12 *H.* 8. enfeoffed the ſaid *Henry Gee* of the other Meſſuages, rendring alſo to him and his Heirs yearly 13 *s.* 4 *d.* at the ſaid Feaſt aforeſaid by equal portions, after which *Holme* the great Grandfather died, *Stephen Holme* being his Son and next Heir, who was ſeiſed of the Rents aforeſaid, and afterwards alſo died ſeiſed, *Robert Holme* being his Son and Heir, after which the ſaid *Henry Gee* died ſeiſed of the ſaid two Meſſuages and Garden, and they deſcended to *Eliz.* his Daughter and Heir, who took to Husband one *Richard Shalcroft*, and had Iſſue the ſaid *Elizabeth* wife of the ſaid *Henry Gee*, Tenant in the *Formedon*, after which the ſaid *Richard Shalcroft* and his wife died, after which and before the marriage had between the ſaid *Henry Gee* and *Elizabeth* now Tenants in the *Formedon*, the ſaid *Elizabeth* enfeoffed one *Richard Greenſearch* of the ſaid Meſſuages and Garden, after which, *to wit*, at the Feaſt of the Annunciation of our Lady, 3 *Eliz.* the ſaid *Henry Gee* husband to the ſaid *Elizabeth*, paid 13 *s.* 4 *d.* for the ſaid Rent reſerved as is aforeſaid, to the ſaid *Robert Holme*, after which, *to wit*, on Munday next, after the Aſſumption of our Lady at *Lancaſter*, before the Juſtices there, a Fine was levied with Proclamations according to the Statute, between *Thomas Aynſworth*, and *Thomas Holden* then being ſeiſed of the Tenements aforeſaid Complainants, and the ſaid *Henry Gee* and *Eliz.* his wife, Deforceants of the Tenements aforeſaid, wherby the Conuſance was made to the ſaid *Thomas*, and *Thomas* who rendred them to the ſaid *Henry Gee* and *Eliz.* his wife, and to the Heirs of their bodies, the Remainder to the right Heirs of the ſaid *Henry*: the five years paſt after the Proclamations in the life of the ſaid *Robert Holme*, after which the ſaid *Robert* died, and *Ralph* his Son and Heir brought the *Formedon* upon the Gift firſt mentioned, and the Tenants plead the ſaid Fine with Proclamations in Bar, and the Demandant replyed, ſhewing the ſeverall diſcontinuances made by the great Grand-father as aforeſaid, and the acceptance of the ſaid Rent by the ſaid *Robert*, by the hands of the now Tenant *Henry Gee* as is before alledged, and that the ſaid Henry was then ſeiſed of the ſaid Tenements in Fee in right of the ſaid Eliz. then his wife, and although that he alledge the ſaid ſeverall Feoffments to be made by Deeds indented, with the reſervation as aforeſaid, yet it is not mentioned in the Replication that he ſhews forth the Deeds wherby the reſervation was made; To which the Tenant by way of Rejoynder ſhew the Feoffment made by the ſaid Eliz. Shalcroft to the ſaid William Greenditch, wherby he was ſeiſed at the time of the payment of the ſaid Rent at the ſaid Feaſt of the Annunciation of our Lady, and traverſe Abſque hoc, that the ſaid Henry Gee was therof then ſeiſed in right of his wife, in manner and form, wherupon it was demurred in Law, and adjudged by the Juſtices of Aſſiſe at Lancaſter, that the Plaintiff ſhould be barred, wherupon the Tenants have now brought their Writ of Error.

And

And by Popham and Clench the Judgment is to be affirmed; Firſt, becauſe that the acceptance of the ſaid Rent had been by the hands of one who was to pay it, to wit, the Tenant himſelf, yet this ſhall not bar the right of Intail in the ſaid Robert Holme (as a releaſe of his right ſhould do) but this acceptance ſhall only foreclose him of his Action, to demand the Land during his life, and therfore the right which the ſaid Robert had, being barred by the Fine, the Son is without remedy, for the Son ſhall never have remedy upon the Fine levied in time of his Father, the five years after the Proclamations being paſſed: But in caſe where the right begin firſt to be a right in the Son, and not where there was right in the Father.

And further, it ſeemed to them, that the payment of him who had not any thing in the Land at the time of the payment, as here, ſhall make no concluſion to him who accept it, becauſe this payment is as none in Law.

And by them the Rejoynder of the Traverſe, Abſque hoc, that Henry Gee was ſeiſed at the time of the payment in Fee, in right of his ſaid Wife, in manner and form, as in the Replication is alledged, is good enough, for he traverſeth that which the Demandant hath ſpecially alledged to deſtroy the Bar, and contrary to that which is alledged, it ſhall not be intended that they had other particular Eſtate at the time of the payment, which may make the payment to be good.

And albeit the Traverſe had been, Abſque hoc, that the ſaid Henry was ſeiſed in right of his ſaid Wife, Modo & forma prout, the Demandant hath alledged without laying in Fee, as it is pleaded here, yet the Jury ſhall be put to find it, if he were ſeiſed in Fee, In jure Uxoris, and not of any other particular Eſtate, as in 12 E. 4. 4. A Feoffment is pleaded by Deed, the other makes Title, and traverſeth Abſque hoc, that he enfeoffed Modo & forma, not ſhewing forth the Deed, yet he who pleads the Feoffment, by Littleton, ſhall give no other Feoffment in evidence, then that which is pleaded by the Deed. And by 18 E. 4. 3. In Treſpaſſe the Defendant juſtifies the entry and ſowing of Corn, becauſe that M. was ſeiſed in Fee, and ſowed the Land, and the Defendant as his Servant entred and cut it, the Plaintiff ſaith, that it was his Free-hold at the time of the ſowing, Abſque hoc, that it was the Free-hold of the ſaid M. and per Curiam, it is not good, for ſuch matter was not alledged by the Defendant, but he ought to traverſe the Seiſin in Fee, which was alledged, and good, and ſo it is good here.

But it ſeems to Clench, that the Replication is not good, becauſe he doth not ſay, by the Waiting upon which the Reſervation was made, which concludes Robert by his acceptance, Hic in Curia prolat. as by Hill. 15. E. 4. 15. If a man will bar a woman of her Action for her Land after the death of her Husband, by Feoffment made by the Baron and Feme, during the Coverture by Deed, rendring Rent, by reaſon of acceptance of the ſaid Rent after the death of the husband, he ought to ſhew the Deed, and ſay, Hic in Curia prolat. or otherwiſe the Plea is not good, becauſe that in ſuch a caſe albeit it were a Gift in Tail, the wife ſhall not be concluded by her acceptance, unleſſe that the Gift were by Deed.

Popham, True it is, in caſe the party will demur upon it: but ſuppoſe in this caſe, the Tenants had expreſly acknowledged the ſaid Feoffments, and then concluded afterwards as they have done here, ſhall they afterwards take advantage of not ſhewing the Deed? I think that not, no more here where they admit it, and plead the other matter to avoid the concluſion; for if a double Plea be pleaded, if the other party demur upon it, he ſhall take the advantage of the doubleneſſe: But if he paſſe it over, and they proceed in pleading upon another point, the doubleneſſe is gone.

And Fennor ſaid, that the right which is intended to be ſaved within the firſt branch of the Statute of 4 H. 7. is, that upon which the party may purſue his Action, or enter for his remedy, the which the ſaid Robert could not do in, when the Fine was levied, becauſe he had accepted the Rent, but the firſt right which was in ſuch a caſe, was that in the Demandant.

Stroud *verſus* Willis.

9. IN Debt upon an Obligation of 40 l. by William Stroud Plaintiff, againſt John Willis Defendant, the Condition wherof was, If the ſaid Willis his Heirs, Executors, or Aſſigns, ſhould pay or cauſe to be paid yearly to the ſaid William Stroud, the Rent, or ſumm of 37 l. 10 s. of lawfull money, at the Feaſts of S. Michael, and the Annuntiation, by equall portions, according to the Tenor, true intent, and meaning of certain Articles of agreement indented, made between the ſaid parties of the ſame date, that the Obligation was, that then the Obligation ſhall be void, and the Defendant ſhews the Articles which were thus, to wit, that the ſaid William Stroud had demiſed to the Defendants all ſuch Tenements in Yeatminſter, of, or in which the ſaid William then had an Eſtate for life by Copy. Anglice Copie des, except according to the cuſtom of the Manor of Yeatminſter, from the Annunciation of our Lady then laſt paſt, for forty years, if the ſaid William ſhould ſo long live, rendring yearly to the ſaid William 37 l. 10 s. of lawfull money, at the Feaſts of S. Michael, and our Lady, by equal portions, under the Eaſt-gate of the Caſtle of Taunton, in the County of Somerſet, &c. with divers things compriſed in the ſaid Articles. To which points the Defendant pleaded, that at the time of the making of the ſaid Articles the Plaintiff had not any Eſtate in the Tenements in Yeatminſter aforeſaid, for tearm of his life, by Copy, Anglice Copie des, except according to any cuſtom of the ſaid Manor of Yeatminſter, and that the Obligation was made for the payment of the ſame Rent reſerved by the ſaid Articles, and demands Judgment, &c. wherupon the Plaintiff demurred in the Common Bench, and there Judgment was given that the Plaintiff ſhould recover his Debt and Damages, as appeareth there, Mich. 36, & 37. Eliz. Rot. 312. upon which a Writ of Error was brought in the Kings Bench, and there moved that the Judgment was erroneous, in as much as upon the matter he ought to have been barred of his Action: for if an Action of Debt had been brought upon the Demiſe, by the Articles, the Defendant might have pleaded as here, and the Plaintiff ſhould be cleerly barred: As if a man be bound to make an Eſtate, or to aſſure to another all the Lands which he hath by deſcent from his Father, or all the Lands which he hath by purchaſe from ſuch a one, or the like.

And of this opinion Gawdy was, ſaying, in as much as the Obligation is, that he ſhall be paid according to the true intent of the Articles, the intent of them is not that the Rent ſhall be paid if any Land be not paſſed by them, for it ſhould be paid, as by 22 H. 6. if a man be bound to pay a Rent which is reſerved upon a Leaſe made to him, he ought to pay it at his peril: But if it be to pay it accordingly to the Leaſe, there he ſaid, it is not payable but upon the Bond, and is to be paid as a Rent. And if the Land be evicted in the interim before the day of payment, the Obligor ſhall help himſelf by pleading of it upon ſuch an Obligation to diſcharge the Bond, ſo here: But it ſeemed to Popham, that the Judgment was well given, and yet he agreed the Caſes that were put; but he ſaid there was a diverſity where the Obligation goes in the generality, and where it tends to a ſpeciality: for as by 2 E. 4. If a man be bound to be Non-ſuit in all Actions which he hath againſt

ſuch

ſuch a one, or to aſſure to another all his Lands in Dale, he may ſay, that he hath not any Suit, or that he hath no Land in Dale: But if it be that he ſhall be Non-ſuit in a Formedon depending, or to enfeoff him of White acre, there it is no plea, becauſe he refers to a ſpecial point. And by 18 E. 4. If a man be bound to another to pay him 10 l. for which a ſtranger is bound to the ſaid Obligee, it is no plea for him to ſay, that the ſtranger is not bound to pay him 10 l. for when the Condition refers to ſuch a ſpeciall matter, this cannot be denied of him who is bound.

And therfore in this caſe the Defendant cannot ſay, that there were not any ſuch Articles, contrary to that which is ſpecially comprized in the Condition, as by 28 H. 6. A man was bound to perform the Covenants comprized in a certain Indenture of Covenants, he ſhall not ſay, that there was not any ſuch Indenture, becauſe it reſorts to a ſpeciall.

So I think, if a man be bound to pay the Rent of 10 l. a year reſerved upon an Indenture of Demiſe made of Lands in D. payable at ſuch a Feaſt, he ſhall not ſay againſt it, that there was no ſuch Demiſe made, nor no ſuch Rent reſerved upon the Demiſe, but is eſtopped of the one and the other. And in Hill. 3. Eliz. A man was bound that he ſhall pay to A. or the Obligee, all ſuch ſumms of mony as T.S. deceaſed ſtands bound to pay by his Obligation to the ſaid A. and of one R. P. to the behoof of the Children of ſuch a one, according to the Will of the ſaid party; and in Debt upon this Obligation he ſaith, that the ſaid T.S. was never bound by any ſuch Writing Obligatory to the ſaid A. and R.P &c. to pay, &c. Pro uſu filiorum, &c. as in the Condition; and per Curiam adjudged no good Bar, becauſe he is eſtopped to deny the ſpeciall matter, which is matter of Writing, and not a bare matter in Deed.

Kirton *verſus* Hoxton, *and others.*

10. IN an Appeal of Mayhem brought by Kirton Plaintiff, againſt Rob. Hoxton Eſq; and divers other Defen. the one of the Defen. plead Nul tiel in rerum natura, as another of the Appellees, and if it be not found then as to the Felony and Mayhem not guilty: Agreed by the whole Court that ſuch a manner of pleading is not to be ſuffered in an Appeal of Mayhem, becauſe no life is put in danger by the ſuit: And yet it was objected that there are preſidents, that ſuch form of pleading hath been admitted in Appeals of Mayhem. But the Court has reſpect to it, that the reaſon in all the Books of Law in which it hath been admitted in an Appeal of death, and the like, is, that it ſtands in Favorem vitæ, and therfore it is admitted to be good, or otherwiſe by the Books, it ſhall not be admitted to be ſo, for the doubleneſſe of it: But no life is to be put in jeopardy in this caſe, and therfore ſuch a plea ſhall not be admitted, but the Not guilty ſhall ſtand, by which the other plea is waived. Appeal of Mayhem.

Hillary

Hillary Term, 38 *Eliz.*

Henry *Earl of* Pembrook, *verſus Sir* Henry Backley.

See this Caſe *Coke lib* 5.76. *a.*

IN an Action upon the Caſe, between Henry Earl of Pembrook Plaintiff, and Sir Henry Backley Knight, Defendant, the caſe upon the pleading appeareth to be thus.

The ſaid Earl was ſeiſed in his Demeſn as of Fee, of the Mannor of Stocktriſt, in the County of Somerſet, to which Mannor the Office of the cuſtody of the Foreſt of Selwood, in the ſame County belongeth, and alſo that there was before time of memory, an Office within the ſame Foreſt called the Lieutenant-ſhip, or Cuſtody of the ſaid Foreſt belonging to the ſaid Mannor, of which alſo the ſaid Earl was ſeiſed in his Demeſn as of Fee: And that there was one part of the ſaid Foreſt called the Weſt part of the ſaid Foreſt, in which there were two Walks, or Bayliwicks, the one called Staverdale walk, and the other Brewick walk: And that the ſaid Lievtenant had the charge of the Deer, and the diſpoſition and appointment of the Keepers of the ſaid Foreſt. And that the ſaid Earl being ſo ſeiſed, by his Writing, bearing date 5. Novemb. 12. Eliz. reciting that his Father had granted the Office of Lievtenant-ſhip, and Deputy-ſhip, of the ſaid Weſt part of the ſaid Foreſt, Cum vadiis, &c. quando acciderit, and the Keeper-ſhip of Brewick-walk aforeſaid, to the ſaid Sir Maurice Barkley Knight, and the Heirs Males of his body, and inſtituted and ordained him, and the Heirs Males of his body, Lievtenant and Deputy therof to the ſaid Earl and his Heirs, confirmed the Grant aforeſaid.

And further by the ſame Deed granted and confirmed to the ſaid Sir Maurice, and to the Heirs Males of his body, the ſaid Lievtenant-ſhip and Deputy-ſhip of the ſaid Weſt part of the ſaid Foreſt, and alſo the Keeper-ſhip of the ſaid Walk called Staverdale Walk, together with the Lodges, &c.

Provided alwaies, and the ſaid Sir Maurice covenanted and granted, for him and the Heirs Males of his body, with the ſaid now Earl his Heirs and Aſſigns, that it ſhall be lawfull for the ſaid Earl his Heirs and Aſſigns, to have all the Preheminence or commandment of the ſaid Game and Hunting, and pleaſure there, as if this Grant had not been made.

Provided alſo, and the ſaid Sir Maurice covenanted, granted, and promiſed for him, and the Heirs Males of his body, to, and with the ſaid Earl, his Heirs and Aſſigns, that the ſaid Sir Maurice and the Heirs Males of his body, and their Aſſignee, and Aſſignees, will preſerve the Game as fair as it commonly hath been uſed, and that neither the ſaid Maurice, nor any of the Heirs Males of his body, nor any of their Aſſignees, will cut any manner of Wood growing upon any part of the Premiſſes, unleſſe for neceſſary Brouſe, and ſuch as they may lawfully cut of their own, and as was accuſtomed, &c. after which Sir Maurice died, and Sir Henry Barkley his Son and Heir Male, cut four Okes within the ſaid Walk called Brewicks, growing upon the ſoile of the Queen there, every one of them being Timber, and of the value of 13 s. 4 d. and converted them to his own uſe. And whether by this act done by the ſaid Sir Henry the now Earl of Pembrook, may re-enter into the things granted by him, was the queſtion, which ſtands upon two points, the firſt, Whether the laſt Proviſo makes a Condition, or be but a meer Covenant. 2. Whether this Act makes a Forfeiture of the ſaid Offices granted as before by the courſe of the Common Law.

Gaudy, Clench, Walmſley, and Beamont, that the firſt Proviſo is not a Condition

Condition, either becauſe he is not by this to do more then he may do by his ſuperior cuſtody, in which caſe he ought to do it by his own authority, as to take his fee Deer, or to chaſe and kill Deer by Warrant, and the like; or otherwiſe if it ſhall be taken, that he may by this Proviſo kill or chaſe the Game at his pleaſure, it is void, becauſe as to it, he is to do that which he ought not to do by his Office, to wit, to deſtroy the Game, which by his Office he is to preſerve; and therefore for the firſt, it ſtands meerly upon the Covenant.

Then when he ſaith further in the ſecond clauſe; Provided alſo, and the ſaid Sir Henry Barkley covenants, this is to be intended that it ſhall be as the other for the word alſo, and this is but a bare Covenant as the firſt was.

And they ſaid further, that this laſt Proviſo ſhall be ſaid entirely the words of the Grantee himſelf, as the Covenant is, and without words of the Grantor a Condition cannot be, for it is for him to condition with the Eſtate given, and not for him to whom the Grant is made; And therefore ſuppoſe that it had been on the other part, to wit, Provided alwaies, and the Grantor covenant that the Grantee ſhall have the refuſe of the houſe, and the like; this ſhall not be ſaid to be any Condition, but a meer Covenant: In like manner ſhall it be on the other part.

And further it is common for Scribeners and ignorant perſons to make in effect every Covenant to begin with a Proviſo in this manner, and therefore to expound ſuch a manner of Proviſo as a Condition, it ſhall be too perilous to the Eſtates of men.

And for the caſe upon the Leaſe made by Serjeant Bendloes, which was thus.

Provided alwaies, and it was covenanted, granted and agreed between the parties, if the Leſſee ſell, or alien the term that the Leſſor ſhall have the preferment, This they agreed to be a good Condition, as was adjudged in the Common Bench, 32 Eliz. but the caſe there is, becauſe they are the words as well of the Leſſor, who may add a Condition to the Eſtate, as of the Leſſee who made the Covenant, which is not here. But they ſaid, that the caſe between Hamington and Pepull which was 17 Eliz. in the Kings Bench, was more nigh in reſemblance to the caſe in queſtion, which was that the ſaid Pepull made a Leaſe for years to Hamington of a Farm, except the wood, and covenanted with the Leſſee that he ſhall take all manner of under-wood; provided alwaies, and the Leſſee covenant that he will not cut any manner of Timber-tree, & this was adjudged no Condition. And as to the other point they ſaid, that the cutting of Trees by him who had the cuſtody of the Foreſt, is not a forfeiture of his Office by the Common Law, as it is of him who hath the cuſtody of a Park, for there is another ſpeciall Officer who hath the charge of wood in a Foreſt, to wit, the Verderer and the Woodward, and therefore it is no forfeiture of him who hath the cuſtody of the Foreſt to cut Trees, for he hath another charge, to wit, the cuſtody of the Game only, and not of the Wood.

And further the cutting of one or two Trees is no cauſe of forfeiture, for it may be that there is Covert, ſhade and houſe ſufficient of that which yet remains, in which caſe it is no forfeiture if it be not averred that theſe things are impaired by it.

But the chief Juſtices, chief Baron and all the other Juſtices and Barons were of a contrary opinion. And for the matter of forfeiture at Common Law, they ſaid that it was a cauſe of forfeiture of an Office at common Law to cut the Trees, as well in the caſe of a Foreſter, as in caſe of a Park-keeper, for the Foreſter hath not only the charge of the Game, but of all that is within the Foreſt by which the Game is fed, preſerved, or ſuccoured,

and they are fed by the browſe, and ſcouzed by the ſhade, and have the calmer and better lodging by reaſon of the Trees; and therfore by their Office they are to have a care of theſe things as well as of the Game, for without theſe the Game cannot ſtand: as to ſay, that there are others who have ſpeciall charge of the Wood and Paſture, as the Woodward, or Agiſter, &c. this is no proof that the Foreſters, or Keepers are diſcharged therby.

And the Foreſters and Keepers are by their Offices to preſent the Diſdoers in the Woods within the Foreſts of the Wood-wards, and therfore they have to do with it. And by Carta de foreſta, none may cut his wood within his Foreſt, Niſi per viſum Foreſtarii, ergo the Foreſters have charge therof: And every voluntary act done by an Officer contrary to that which belongs to his Office is a forfeiture of his Office, as by voluntary killing of Bucks, cutting of Trees, Wood, or the like: but otherwiſe it is of things done or ſuffered by his negligence if it be not common or often. And albeit the Trees here were not many, or that it was not averred that the Game was to be hurt therby, yet it cannot be intended but that it is ſo much impaired by it, as it ſhould be by the killing of a Buck in the Foreſt, by which the Office ſhall be forfeited, becauſe the Game is therby the worſe, and yet there may be Game ſufficient without this Buck, but he hath voluntarily done a thing contrary to his Office, and therfore it is a Forfeiture of his Office, and ſo it ſhall be in this caſe.

And for the other point they ſaid, it was a Condition and alſo a Covenant, and it was for good purpoſe to have it to be ſo: For ſuppoſe that the Game had been deſtroyed by the ſaid Sir Henry, ſhall this be a ſufficient recompence or ſatisfaction to enter for the Condition broken? No, and therfore the Covenant was made to recompence him for Damages.

When a Proviſo makes a Condition.

And when upon the Habendum a Proviſo is added for a thing to be done by him to whom the Deed is made, or to reſtrain him to do any thing, this is a Condition, as well as if it had been a Condition which ſhall make or ſhall reſtrain to do ſuch a thing, for they are in this caſe the words of the Grantor, to reſtrain the Grant in ſome manner, and to ſhew in what manner he ſhall have it, and it is alwais to him who paſſeth the Eſtate, and to no other. Then ſuppoſe here, that the Proviſo had been; Provided alwaies that the Grantee ſhall not cut any Tree, And the Grantee covenant alſo that he will not cut any Tree, this is plainly a Condition and alſo a Covenant; then it is as plain in the caſe in queſtion, which is; Provided alſo, and the Grantee covenant, &c. that he will not cut any manner of Wood: diſtinguiſh the ſentence by his proper diſtinction, and it is cleer that it is a Condition as well as a Covenant. And to ſay, that there is a diverſity between this caſe and the caſe upon Serjeant Bendloes Leaſe, becauſe there it is, Provided alwaies, and it is covenanted and agreed between the parties; In which caſe it is alledged, that the agreement which is the Plaintiffs, goes to the Proviſo to make it a Condition for him, as well as it ſhall go to the Grantee to make it to be a Covenant from him: they underſtand no difference, becauſe the Proviſo as it is placed, is of it ſelf as ſpoken by the Plaintiff; and the agreement between the parties that ſuch a thing ſhall be done by the Leſſee, makes it a Covenant on his part only, all being to be performed by him, as plainly as in the caſe in queſtion.

And to ſay, that the laſt Proviſo ſhall not be a Condition, becauſe the firſt cannot enure as a Condition, becauſe that which is to be done may lawfully be done with it, or without it, or becauſe that the matter to which the Proviſo is annexed, is repugnant to the nature of the thing granted, yet this is not becauſe of the nature of the word it ſelf, but by reaſon of that to which the Proviſo is annexed, and therfore the Proviſo following hindred in its operation by

by meanes of the word, alſo: And therefore if a man makes a Leaſe for yeers, provided alwayes that the leſſor may enjoy and hold the Mannors of D. (which is other Land) or that the Leſſee ſhall kill I.S. theſe are void of Conditions; But grant then that it is further provided alſo that he ſhall not alien his Terme, is not this a good Condition although that which was Precedent was no Condition? It is cleer that is not; And they ſaid for Hamingtons Caſe that it was but of the nature of a declaration with what wood the Leſſee ſhall meddle, becauſe it depends upon the Covenant of the Leſſor, and it is generall, to wit, that he may cut any manner of underwood, provided that he do not cut any manner of Timber; and Popham was of councell with Hamington in this caſe, and the Court at the beginning inſiſted much that it was a Condition, and that for the reaſon then alledged, that it depended upon the Covenant of the Leſſor, which was general for all manner of under-wood, becauſe that Standels growing between great Trees, might be taken within the generall words of all manner of underwood, for to make it plain it was well put in, that he ſhall not cut any manner of Timber Trees, and therfore in this point it was but a Declaration, with what wood he ſhould meddle, although in truth it was of another thing then was compriſed in the Covenant before: And then the adding of a Covenant to ſuch a Proviſo ſhall not make the Proviſo of another nature, then it was before the Covenant made, or if no Covenant had been added to it, and upon this reaſon the Court then gave Judgment for Hamington. And by him, if I am ſeiſed of the Mannor of D. in D. and of Black acre in D. and ſo ſeiſed, I covenant with I.S. that he ſhall enjoy the ſaid Mannor for ten years: Provided and the ſaid I.C. covenant that he ſhall not enjoy Black acre, this Covenant is not a Condition, but a Declaration deduced out of my Covenant, to make a plain Declaration, that it is not my intent that Black acre ſhall paſſe, be it parcel or not parcel of the ſaid Mannor; Then the Covenant following will not alter the nature of the expoſition of the Proviſo which the Law ſhall make of it ſelf, if it had ſtood of it ſelf without a Covenant following.

And for the Proviſo here, he put this caſe, ſuppoſe it had been; Provided, and the Grantee covenants that he ſhall not cut any Trees: None will deny but that this had been a Condition and a Covenant alſo: And what diverſity is there where the word is at the concluſion, and ſo couple the Condition and Covenant together. And we are not to alter the Law for the ignorance of Scriveners, who do they know not what by their ignorance, ſhall be corrected by the Law.

And they agreed, that where a principall Officer is by his Office to make inferior Officers under him, and the inferior Officer commits a forfeiture, the ſuperior Officer ſhall take advantage therof, and ſhall place a new Officer, as was done in 39 H. 6. for the Office of the Marſhall of the Kings Bench, put in by the great Marſhall of England.

Eaſter

Eaſter Term, 39. Eliz.

Overton *verſus* Sydall.

1. IN Debt between Valentine Overton Clark, Prebendary of the Prebend of Tervin in the County of Cheſter, founded in the Cathedrall Church of Litchfeild in the County of Stafford, againſt Thomas Sydall Executor of William Sydall, the caſe appeared to be this.

Henry Sydall Clark, Prebendary of the Prebend, 26 Mail 5. E. 6. with the aſſent of the Dean and Chapter, and by Writing indented, demiſed the ſaid Prebend. to the ſaid William Sydall for 43. years from the Feaſt of the Annunciation of our Lady, in the year of our Lord 555. at the yearly rent of 36 l. William Sydall aſſigned over his term, and died, making the ſaid Thomas his Executor, Henry Sydall alſo died, and afterwards the Plaintiff was made Prebend, and for the rent arrear in his time, and after the aſſignment this Action is brought againſt the Executors in the *Debet* and *Detinet*.

And it was alledged that in Hillary Term 36 Eliz. Rot. 420. in the caſe between Glover and Humble, it was adjudged in the Kings Bench, that the Grantee of the Reverſion ſhall not maintain an Action of Debt upon a Leaſe for years againſt the Leſſee himſelf, for any arrears of Rent incurred, after that he had made an aſſignment of his Term over to another, and alledged alſo that in Hillary, 29 Eliz. in a caſe between it was adjudged, that an Action of Debt lyeth for the Leſſor himſelf againſt the Leſſee, for arrearages of Rent reſerved upon the Leaſe, and accrued after the Leſſee had aſſigned his Term over; and both theſe caſes were adjudged accordingly in the Kings Bench, and the reaſon in the firſt caſe was, becauſe that by the Grant of the Reverſion over, the privity of contract which was between the Leſſor and the Leſſee is diſſolved, and the Grantee of the Reverſion as to it but a ſtranger.

But in the laſt caſe the privity of contract is not diſſolved between the Leſſor and the Leſſee, notwithſtanding the Leſſee hath paſſed over his Term, neither is the contract thereby determined between the parties.

But Fennor ſaid, that in this caſe the privity in Deed is gone by the death of the Leſſee, and therefore the Executor who is but privy in Law, is not ſubject to this Action, unleſſe in caſe where he hath the Term; in which caſe he ſhall be charged as he who hath Quid pro quo, which is not in the caſe here.

And he ſaid further, that a Leaſe made by a Prebend is good no longer then his own life, but is meerly void by his death, and therefore ſhall not be ſaid to be a contract to bind further then his life, and therefore alſo he ſaid, that the Action will not lye in the ſaid caſe for the Succeſſor.

But Gawdy ſaid, that here the Leaſe is confirmed, and therefore good during the Term, but it ſeemed to him that the Executor who is but in privy in Law ſhall not be chargable with this action, for the arrearages due after the aſſignment over, and yet he agreed that the Heir, the Succeſſor, and the Executor of the Leſſor ſhall have debt againſt the Leſſee himſelf, for the arrearages which accrues to be due after the aſſignment over of the Leaſe:

But

But he ſaid, that the Action of Debt againſt the Executor upon a Leaſe made to the Teſtator, and for the arrearages due in the time of the Executor, ought to be in the Debet and Detinet, and that for the occupation of the Term, whereby he hath Quid pro quo, which is not in this caſe.

Popham ſaid, that for the time that the contract ſhall bind in nature of a Contract, there is not any difference between the Heir the Succeſſor, and the Executor of the Leſſor, and the Executor or Adminiſtrator of the Leſſee, for the one and the other are equally privy to the Contract, and a Contract or Covenant eſpecially being by writing, binds as ſtrongly the Executor or Adminiſtrator, as the Teſtator or the Inteſtate himſelf who made it. For theſe are privies indeed to the Contract, and as to it repreſent the perſon of the Teſtator or Inteſtate himſelf.

And he agreed, that the Action of Debt againſt the Executors, for the arrearages of Rent of a Leaſe which he occupies as Executor, and accrued in their own time, ſhall be in the Debet and Detinet; The reaſon is, although they have the Land as Executor, yet nothing thereof ſhall be imployed to the Execution of the Will, but ſuch Profits as are above that which will make the Rent, and therfore ſo much of the Profits as is to make, or anſwer the Rent, they ſhall take to their own uſe to anſwer the Rent, and therfore they having Quid pro quo, to wit, ſo much of the Profits for the Rent, the action ought to be brought againſt them in ſuch caſes, where they are to be charged in Debt for Rent upon a Leaſe made to the Teſtator, and have not the Profits of the Leaſe it ſelf, nor means, nor default in them to come to it, the action of Debt ought to be againſt them in the Detinet only and this is the caſe here, and therfore the action being in the Debet and Detinet doth not lye.

And further he agreed in this caſe to the opinion of Fennor, that the action here doth not lye for the Succeſſor of the Prebend who made the Leaſe, for no more then the Succeſſor in this caſe ſhall be bound by the Contract of his Predeceſſor, no more ſhall he take advantage by this Contract, for it is the conſideration which makes him to be bound, and not only the Contract, and ſo the Succeſſor in ſuch caſes is but privy in Law, and not in Deed to the Contract of his Predeceſſor. But otherwiſe it is of the Succeſſor of a Biſhop and the like, which Leaſes are not void againſt the Succeſſor, but voidable.

Caſe of Armes.

2. UPon an aſſembly of all the Juſtices and Barons at Sergeants-Inne, this Term, on Sunday the 15. day of April, upon this queſtion moved by Anderſon chief Juſtice of the Common Bench: Whether men may arme themſelves to ſuppreſſe Riots, Rebellions, or to reſiſt Enemies, and to endeavour themſelves to ſuppreſſe or reſiſt ſuch Diſturbers of the Peace, or quiet of the Realm; and upon good deliberation, it was reſolved by them all, that every Juſtice of Peace, Sheriff, and other Miniſter, or other Subject of the King, where ſuch accident happen may do it: And to fortifie this their reſolution, they peruſed the Statute of 2 E. 3. cap. 3. which enacts that none be ſo hardy as to come with force, or bring force to any place in affray of the Peace, nor to go or ride armed, night nor Day, unleſſe he be

Servant to the King in his preſence, and the Miniſters of the King in the execution of his Precepts, or of their Office, and theſe who are in their company aſſiſting them, or upon cry made for Weapons to keep the Peace, and this in ſuch places where accidents happen upon the penalty in the ſame Statute contained; wherby it appeareth, that upon cry made for Weapons to keep the Peace, every man where ſuch accidents happen for breaking the Peace, may by the Law arme himſelf againſt ſuch evill Doers to keep the Peace.

But they take it to be the more diſcreet way for every one in ſuch a caſe to attend and be aſſiſtant to the Juſtices, Sheriffs, or other Miniſters of the King in the doing of it.

3. AT the ſame time it was alſo reſolved by them all (except Walmſley, Fennor, and Owen) in the Caſe of one Richard Bradſhaw and Robert Burton, who with others lately by word entred themſelves into an agreement one with another to riſe and put themſelves into Armes, and ſo to go from one Gentlemans houſe to another, and ſo from houſe to houſe to pull down Incloſures generally; that this ſo appearing by their own confeſſion, or by two Witneſſes according to the Statute, is high Treaſon by the Statute of 13 Eliz. cap. 1. The words of which Statute are, That if any intend to levy War againſt the Queen, and this maliciouſly, adviſedly, and expreſly declare or utter by any words or ſayings, that this ſhall be high Treaſon: For all agreed that Rebellion of Subjects againſt the Queen hath been alwaies high Treaſon at the Common Law, for the Statute of 25 E. 3. cap. 1. is, that levying of War within the Realm againſt the King is Treaſon, and Rebellion is all the War which a Subject can make againſt the King.

Rebellion of Subjects high Treaſon.

But Walmſley and the others with him ſaid, that the Statute of 1 Mar. cap. 12. 10. That if any to the number of twelve, or more, aſſemble themſelves to the intent to pull down Incloſures, Pales, and the like with force, and continuing together after proclamation, according to the Statute, to go away by the ſpace of an hour, or do any of the Offences mentioned in the Statute, that this is Felony: So that if theſe Actions had been Treaſon at the Common Law, it had been to no purpoſe to have made it Felony.

And it ſeemed to them that the reſiſtance ought to be with force to the Queen, before that ſuch Acts ſhall be ſaid Treaſon.

But all the other Juſtices agreed (and ſo it was put in ure lately in the caſe of the Prentices of London) that if any aſſemble themſelves with force to alter the Laws, or to ſet a price upon Victualls, or to lay violent hands upon the Magiſtrate, as upon the Major of London, and the like, and with force attempt to put it in action, that this is Rebellion and Treaſon at Common Law, and yet this Statute of 1 Mariæ, makes it in ſuch a caſe but Felony.

And they put a diverſity between the caſes of pulling down Incloſures, Pales, &c. compriſed in the Statute of 1 Mar. for thoſe are to be underſtood where diverſe to the number of twelve, or more, pretending, any or all of them to be injured in particular, as by reaſon of their common, or other Intereſt in the Land incloſed, and the like, and aſſembling to pull it down forcibly, and not to the caſes where they have a generall diſlike to all manner of Incloſures, and therfore the aſſembling in a forcible manner, and with Armes to pull them down where they have any Intereſt, wherby they were in any particular

particular to be annoyed or grieved, is not Treaſon; but the caſe here tending to a generality, makes the act if it had been executed to be high Treaſon by the courſe of the Common Law.

And therfore the intention appearing as the caſe is here, it is Treaſon by the Statute of 13. aforeſaid.

Periam in ſome manner doubted of the principall caſe, but to intend to riſe with force to alter the Laws, to ſet price upon any Victuals, or to uſe force againſt a Magiſtrate for executing his Office of Juſtice, and the like, he ſaid that they were cleerly Treaſon by the Statute of 13. aforeſaid, if it may appear by expreſſe words, or otherwiſe, as the ſaid Statute mentions, for all theſe tend againſt the Queen, her Crown and Dignity, and therfore ſhall be as againſt the Queen her ſelf: And if it had been put in practice it had been Treaſon at the Common Law.

Here ends the LORD *POPHAM'S* REPORTS.

An

An addition of certain Select CASES in the time of KING *JAMES*, and KING *CHARLES*.

Trin. 15. *Jac.* In the Kings Bench, entred, *Hill. Jac. Rot.* 194.

Brooks *Caſe.*

IN an Ejectione firmæ broug̃ by one Brook againſt Brook, the Caſe was thus.

John Wright a Copyholder in Fee, 10 Eliz. ſurrendred his Land into the hands of the Lord by the hands of Tenants, according to the Cuſtom, &c. without ſaying, to whoſe uſe the Surrender ſhould be; And at the next Court the ſaid John Wright was admitted Habendum to him and his Wife in Tail, the remainder to the right Heirs of John Wright, and the Wife of John Wright now Defendant was ſeiſed from the time of the admittance untill this day: And it was objected by the Counſell of the Plaintiff, that the ſurrender was void. becauſe no uſe was limitted, and therfore by conſtitution of Law ought to be to the uſe of the Surrender, as if a Feoffment be made and no Uſe limited, it ſhall be to the Uſe of the Feoffor, or as it is in Sir Edward Cleers Caſe Coke lib. 6. 18. If a Feoffment be made by one to the uſe of his laſt Will, he hath the uſe in the mean time.

Where upon ſurrender of Copyhold land no uſe is limited, to whoſe uſe it ſhall be.

2. That the admittance was not available to paſſe an Eſtate to the Wife, for ſhe was not named in the Premiſſes but only in the Habendum, and the Office of an Habendum is to limit the Eſtate and not the perſon, and therfore it is ſaid in Thrgmorton and Tracies Caſe in Plowd. com. That if one be named to take an Eſtate in the Habendum, where he was not named at all in the Premiſſes, this is not good.

But it was reſolved by the whole Court for the firſt point, that the ſubſequent Act ſhall explain the Surrender, for, Quando abeſt Proviſio partis, adeſt proviſio legis: And when the Copyholder accepts a new admittance, the Law intends that the Surrender generally made was to ſuch an Uſe, as is ſpecified in the admittance, and the Lord is only as an Inſtrument to convey the Eſtate, and as it were put in truſt to make ſuch an admittance, as he who ſurrenders would have him to make: And Crook Juſtice ſaid, Fides adhibita fidem obligat.

For the ſecond point it was alſo agreed by the Court that the Wife ſhall take by this admittance, albeit ſhe were not named in the Premiſſes, but only in the Habendum; and they agreed, that in Feoffments and Grants, the party that is not named in the Premiſſes ſhall not take by the Habendum: and therfore Throgmorton and Tracies Caſe (as to this point) is good Law; But this caſe of a Copyhold is like to the caſe of a Will, or to the caſe of Frank-marriage, in which it is ſufficient to paſſe an Eſtate, albeit the party be only named in the Habendum, and if it ſhould be otherwiſe the Eſtates of many Copyholders would be ſubverted: And ſo they reſolved that Judg. ſhould be given for the Defendant.

The ſame Term in the ſame Court.

Laurking *and* Wildes *Caſe.*

Tithes for a riding Nag.

The Rector of the Church of libelled in the ſpirituall Court, for the Tithes of a riding Nag, where the caſe was; That a man let his Land, reſerving the running of a Horſe at ſome time, when he had occaſion to uſe him there: The Defendant ſhewed this matter in the Court by his Counſell, and prayed a Prohibition, and avers, that for the ſame Land in which the Horſe went he paid Tithes. And by the Court, nigh London, a man will take a 100. or 200. Horſes to Graſſe, now he ſhall pay Tithes for them, or otherwiſe the parſon ſhall be defeated. But in this caſe, if the Defendant alledge and prove that it was a Nag for labour, and not for profit, a Prohibition lies.

The ſame Term in the ſame Court.

Havergall *verſus* Hare.

Afterwards fol 55.

In an Ejectione firmæ brought by Havergal againſt Hare, the Caſe was thus. A Rent of 20 l. per annum was granted out of Green acre to one and his Heirs, to be paid at Michaelmas, and the Annunciation of our Lady, by equall portions, and the Grantor covenants, that if the Rent of 20 l. be arrear by the ſpace of twenty daies, that the Grantee may diſtrain, and that if there be not ſufficient diſtreſſe upon the Land, or if there be a Reſcous Replevin, or Pound-breach, that then it ſhall be lawfull for the Grantee and his Heirs to enter and retain the Land to them and their Heirs, untill the 20 l. be paid, 10 l. for one half years Rent was in arrear, and for it an entry was made.

Mountague chief Juſtice, and Doderidge Juſtice, there can be no entry made when 10 l. only is behind, for the words of the Deed are, that if the Rent of 20 l. be behind, that the Grantee and his Heirs may enter, and if he ſhall enter now he ſhall retain the Land for ever, for the 20 l. ſhall never be paid.

Crook and Haughton Juſtices, contrary, for if 10 l. be arrear, the Rent of 20 l. is arrear; for Haughton ſaid, In an Aſſiſe of Rent of 40 l. where part is arrear, yet he ought to bring his Aſſiſe for the whole Rent of 40 l. for the Writ ought to agree with the Deed.

Doderidge agreed with him in the caſe of an Aſſiſe, but not in the principall point.

And

And for the ſecond point it was agreed by them all, that upon the entry of the Grantee, he ſhall have a Fee-ſimple determinable, admitting the entry for the 10 l. to be good.

The ſame Term in the ſame Court, and it is entred, 14 Jac. Rot. 1484.

Robinſon *verſus* Walter.

RObinſon brought an Action of Trover and Converſion againſt Walter, and upon the whole matter the caſe appeared to be this.

A Stranger took the horſe of the Plaintiff, and ſent him to a common Inn, and there he remained for the ſpace of half a year, at which time the Plaintiff had notice where his Horſe was, and thereupon he demanded him of the Inn-keeper, who anſwered that a perſon unknown left the Horſe with him, and ſaid, that he would not deliver the Horſe to the Plaintiff unleſſe he would pay for his meat, which came to 3 l. 10 s. for all the time, and alſo would prove that it was his Horſe, upon which the Plaintiff demurred in Law.

An Inn-keeper may detain a Horſe untill he be ſatisfied for meat, albeit he be left by a ſtranger.

And it was reſolved by Mountague chief Juſtice, Crook, and Doderidge, Juſtices (Haughton Juſtice diſſenting) that the Defendants plea was good, for the Inn-keeper was compellable to keep the Horſe, and not bound at his peril to take notice of the Owner of the Horſe. And by the cuſtom of Lond. if a horſe be brought to a common Inn, wher he hath (as it is commonly ſaid) eaten out his head, it is lawfull for the Inn-keeper to ſell him, which caſe of the cuſtom implies this caſe. And there is a difference where the Law compels a man to do a thing, and where not; As if the Lieutenant of the Tower brings an Action of debt for Dyet againſt one who was his Priſoner, in this caſe the Defendant cannot wage his Law, becauſe the Law compels the Lieutenant to give Victuals to his Priſoner, otherwiſe if another man brings an Action of debt for Dyet, and in the caſe at the Bar the Inn-keeper was compellable. And Doderidge ſaid, that if the Law were as the Plaintiff would have it, it were a pretty trick for one who wants a keeping for his Horſe. And Mich. 6 Jac. in the Kings Bench, between Harlo and Ward, the like was reſolved as was cited by Barkeſdels of Counſell with the Defendant.

Mich. 14. *Jac. In the Kings Bench.*

Rawlinſon *verſus* Green.

A Copyholder ſurrendred out of Court, according to the cuſtom of the Mannor, which at the next Court was preſented, and entry therof made by the Steward, Scilicet Compertum eſt per homagium, &c. but no admittance; Afterwards Ceſtuy que uſe ſurrenders before admittance, and the firſt Copyholder ſurrenders to the Plaintiff: And in this caſe there were two queſtions.

1. Whether he may ſurrender before admittance?

2. Who ſhall have the Land? whether the firſt Copyholder, or the Lord? Haughton Juſtice held that he could not ſurrender before admittance, and the

A ſurrender of Copyhold cannot ſurrender before admittance.

the entry of the ſurrender doth not make an admittance, for this being the ſole act of the Steward, ſhall not bind the Lord, and it is not like to the uſuall form of an admittance, for that is, Dat Domino de fine fecit fidelitatem & admiſſus eſt inde tenens. Doderidge Juſtice agreed and ſaid, that in Hare and Brickleys caſe, the admittance of a Copyholder was compared to the induction to a Benefice which gives the poſſeſſion.

Hillary 14. *Jac. In the Kings Bench.*

Sir John Pools *Caſe.*

THree Executors brought an Action of Debt, and one only declared, and they were ready for a triall in the Country, and now it was moved that the Declaration might be amended, and the names of the other Executors incerted: but per Curiam this cannot be without the aſſent of the parties.

Paſch. 15. *Iac. In the Kings Bench.*

Cooper *verſus* Smiths.

Action for theſe words, *Thou haſt killed thy Maſters* Cook.

AN Action upon the Caſe was brought for theſe words; viz. Waterman, and thou (Innuendo the Plaintiff) haſt killed thy Maſters Cook Innuendo, &c. and I will bring thee in queſtion for thy life: And after Verdict for the Plaintiff, it was moved in Arreſt of Judgment by the Counſell of the Defendant, that the words were not actionable for the incertainty, inaſmuch as it doth not appear who was his Maſter, nor that his Maſter had a Cook.

Innuendo cannot make a thing that is uncertain certain.

Mountague chief Juſtice ſaid, that the words were actionable, and albeit an Innuendo cannot make a thing that is uncertain certain, but ſhall ſerve as a Predict, yet the words import that he had a Maſter, and that his Maſter had a Cook, to which all the Court agreed, and Judgment was given for the Plaintiff.

Thou haſt ſacrificed thy child to the Devill.

And another Action was brought for theſe words, Scil. Thou haſt ſacrificed thy Child to the Devill; and adjudged that the words were actionable.

Mich. 15. *Iac. In the Kings Bench.*

Lee *verſus* Brown.

Whether copyhold Lands may be intailed.

IN an Ejectione firmæ brought by Lee againſt Brown, the Caſe was this. A Tenant in Tail of Copyhold Land ſurrendred the ſame into the hands of the Lord, to the uſe of I. S. wherupon two points did ariſe. 1. Whether Copyhold Land be within the Statute de Donis conditionalibus, ſo that it may be intailed. 2. Whether the Intail may be cut off by the ſurrender.

Doderidge Juſtice ſaid, as to the firſt point, that it hath been a great doubt, whether it may be intailed, but the common and better opinion was, that by the ſame Statute co-operating with the cuſtom it may be intailed, and with this

this agrees Heydons caſe in my Lord Cokes 3. Report, and ſo was the opinion of the Court.

An Intail of copyhold land not to be cut off by ſurrender, unleſſe by ſpeciall cuſtom.

And for the ſecond point, their opinion alſo was, that it could not be cut off by ſurrender, unleſſe it were by ſpeciall cuſtom, and they directed the Jury accordingly: And it was ſaid to maintain this cuſtom, it ought to be ſhewn that a Formedon had been brought upon ſuch a Surrender, and Judgment given that it doth not lye; yet it was agreed that it was a ſtrong proof of the cuſtom, that they to whoſe uſe ſuch Surrenders had been made, had enjoyed the Land againſt the Iſſues in Tail: And it was ſaid by the Counſell of the Defendant, that there was a Verdict for them before in the ſame caſe, which they could prove by witneſſes, but the Court would not allow ſuch a proof becauſe it was matter of Record, which ought to be ſhewn forth.

In the ſame Term in the Common Pleas.

May *verſus* Kett.

Words. *Thou haſt ſtoln my Corn out of my Barn.*

AN Action upon the Caſe was brought for theſe words; viz. Thou haſt ſtoln my Corn out of my Barn; And it was moved in Arreſt of Judgment, becauſe he had not ſaid how much he had ſtoln, and perhaps it was of ſmall value: and yet it was adjudged that the Action would lye, for it is at leaſt petit Larceny: But if he had ſaid, that he had ſtoln his Corn generally, it had not been actionable, for it might have been growing, and then it had been but a Treſpaſſe.

The ſame Term in the Star Chamber.

Riman *verſus* Bickley, *and others.*

IOhn Riman exhibited a Bill in the Star Chamber, againſt Thomas Bickley, and Anne his Wife, Dr. Thorn, Mr. Goulding, and others Defendants, the ſaid Anne was firſt married to Deveniſh Riman the Plaintiffs Son, and between them were many jars and diſagreements, and the ſaid Deveniſh was much given to drinking, and other Vices, and divers times did beat and abuſe his Wife, and was alſo jealous of the ſaid Thomas Bickley, and his Wife being at a certain time at Supper with Dr. Thorn, Goulding, and others, ſpake ſuch words as theſe (having communication that her Husband did beat and abuſe her) to wit, That ſhe heard that his Father had that quality, and being once whipt for it, was the better ever after, and that if ſhe thought it would do her Husband any good, ſhe would willingly beſtow 40 s. on ſome body to give him a whipping wherupon Goulding ſaid, that he would give him a Medecine for his Malady, and within two daies after he came in the night in womans apparrell, with a Weapon under his Cloak, and with a Rod, and went into the Houſe and Chamber of the ſaid Deveniſh, and would have whipped him, and in ſtriving together, there was ſome hurt done on either ſide, but Goulding not being able to effect his purpoſe, fled, and this was conceived to be by the procurement of Anne his wife: And not long after Deveniſh fell ſick, and ſent to his ſaid wife for certain neceſſaries, which ſhe would not ſend him, and preſently after Deveniſh died, and ſhe refuſed to come to his buriall.

And although it were much diſliked that Deveniſh ſhould abuſe his Wife in ſuch uncivill manner, as to ſtrike and beat her, and (as Coke late chief Juſtice ſaid) it is not lawfull by the Act Military for one man to ſtrike another in the preſence of Ladies, yet it was reſolved by the whole Court, that it was a great miſdemeanor in the Wife, and uncivill and undutifull carriage in her to do ſo to her Husband, as they uſe to do to Children or fools, to wit, to give them the Whip, and ſo to diſgrace and take away the good name of her Husband, which, viz. A mans good name and his Childrens, are the two things which make a man live to Poſterity; as was ſaid by Sir Francis Bacon Lord keeper: and the Court fined the Wife 500 l. and it was ſaid, that Thomas Bickley her now Husband well deſerved to pay this Fine, becauſe he was too familiar with her in the time of his Predeceſſor, and as the Biſhop of London ſaid, Deveniſh Rimon lay upon her hands, and Thomas Bickley upon her heart: And to aggravate this matter, a Letter was ſhown wherein Deveniſh Rimon wrote to his Wife, in which he called her Whoor, and told her ſomwhat roundly of her faults, and ſhe wrote back to him in the Margent, that he lyed, and wiſhed him to get a better Scribe for his next Letter, for he was a Fool that wrote that, wherin ſhe called him Fool by craft: And Goldings offence was accounted the greater, becauſe he was a Miniſter, ſo that he was fined 500 l. alſo: And Coke ſaid, that the courſe of this Court was that if any were fined who is not able to pay it Reſpondeat ſuperior, he that is the principall and chief agent therin muſt anſwer it, for otherwiſe poor men might be made Inſtruments of great miſchief, who are not able to anſwer, and the greater Offenders ſhall eſcape, which the Lord Keeper confirmed. And as to Doctor Thorn he was acquitted by all: And the Biſhop of London ſaid, that they had thought to have troad upon a Thorn, and they gat a Thorn in their foot: And by Coke, if Deveniſh Rimon had died upon it, it had been capitall in the Wife who procured it, for it was an unlawfull Act.

The ſame Term in the Kings Bench.

Weſcot *verſus* Cotton.

Where an Infant Executor may declare by Attorney, but not defend by Attorney, but by Guardian.

The caſe was this. An Infant Executor upon an Action brought againſt him appeared by Attorney, where he ought to appear by Guardian, and it was reſolved by the Court that this was Error, for this doth much concern the Infant, in as much as by his falſe plea he ſhall be bound to anſwer of his own Goods, if he hath no Goods of his Teſtator, and therfore in a 11 E. 4. 1. he hath remedy againſt his Guardian for pleading a falſe Plea.

And by Doderidge, if he hath no Guardian, the Court ſhall appoint him a Guardian. And if an Infant bring an action as Executor by Attorney, and hath Judgment to recover, this is not erronious, becauſe it is for his benefit; ſo per Curiam, the difference is where he is Plaintiff, and where he is Defendant: And there is another difference where he is Executor, and where not, for being Executor, his Plea might have been more prejudiciall to him, and Coke lib 5. Ruſſels caſe was agreed for good Law, for an Infant may be Executor, and may take money for a Debt, and make a Releaſe and give an Acquittance, but not without a true conſideration and payment of the money.

The ſame Term in the ſame Court.

Thomas Middletons *Caſe.*

THomas Middleton, alias Strickland was condemned for a Robbery at the Aſſiſes in Oxford, after which he made an eſcape, and being taken again he was brought to the Bar, and upon his own confeſſion that he was the ſame party who did the Robbery, and that he was condemned for it, the Court awarded execution: And Mountague chief Juſtice ſaid, that was no new caſe, for it had been in experience in the time of E. 3. and 9 H. 4. and 5. E. 4. that the Court might ſo do upon his own confeſſion: And becauſe the Sheriff of Middleſex did not give his attendance upon the Court in this caſe, nor came when he was called, the Court fined him 10 l. And Mountage ſaid, that it ſhall be levied by proces out of the Court, and alſo all other Fines there aſſeſſed and not eſtreated into the Exchequer, for then the party might compound for a matter of 20 s. and ſo the King be deceived.

Where a Felon is condemned, and eſcapeth and is re-taken, upon confeſſion that he is the ſame party, execution may be awarded.

The Sheriff of *Middleſex* fined for not attending the Court.

The ſame Term in the ſame Court.

Gouldwells Caſe.

IOhn Gouldwell ſeiſed of Land in Socage Tenure deviſed them to his Wife for life, the Remainder to John Gouldwell his Son and his Heirs, upon Condition that after the death of his Wife he ſhall grant a Rent-charge to Steven Gouldwell and his Heirs, and if John Gouldwell dye without Heirs of his body, that the Land ſhall remain to Steven Gouldwell in Tail; the Wife dieth, John Gouldwell grants the Rent accordingly, Stephen Gouldwell grants the Rent over: John Gouldwell dies without Heir of his body, and the ſecond Grantee diſtrains for the Rent arrear, and Stephen Gouldwell brings a Replevin: And it was urged by the Counſell for the Plaintiff that this Rent ſhall not have continuance longer then the particular Eſtate, and cited 11 H. 7. 21. Edricks caſe, that if Tenant in Tail acknowledge a Statute this ſhall continue but during his life: and Dyer 48. 212. But it was agreed per Curiam that the Grantee was in by the Deviſor, and not by the Tenant in Tail, and therfore the Grant may endure for ever.

But for the ſecond point, this being to him in Remainder, the intent of the Deviſor is therby explained that he ſhall have the Rent only untill the Remainder come in poſſeſſion, for now the Rent ſhall be drowned in the Land by unity of poſſeſſion.

3. It was agreed and reſolved, that by the granting of the Rent over this was a confirmation. And Mountague ſaid, that it was a confirmation during the Eſtate Tail, and ſhall enure as a new grant afterwards: And Haughton and Doderidge ſaid, that they would not take benefit of the grant over by way of confirmation, for as Haughton ſaid, this enures only ought of the Deviſor, and he hath power to charge the Land in what manner he pleaſeth, and it is like to an uſuall caſe, as if a man makes a Feoffment in Fee to the uſe of one for life, the Remainder over, with power to make Leaſes, and after he makes a Leaſe, this is good againſt Tenant for life, and him in the Remainder alſo: And I have conſidered what the intent of the Deviſor ſhould be in granting of this Rent, and it ſeems to me, that in as much as the Land is limited in Tail, and the Rent in Fee, that by this the Grantee ſhall have power to grant or diſpoſe of the Rent in what manner he would:

but

but if the Land had been in Fee, I ſhould have conſtrued his intent to have been, that the Grantee ſhould have the Rent only untill the Remainder fall; to which Doderidge agreed, who ſaid, that we are in the caſe of a Will, and this conſtruction ſtands with the intent of the Deviſor, and ſtands with the Statute, which ſaies, Quod voluntas Donatoris eſt obſervanda.

The ſame Term in the ſame Court.

Baskervill *verſus* Brock.

Difference between baile in the Kings Bench and the Common Pleas. And how a bail ſhall relate.

A Man became Bail for another upon a Latitat in the Kings Bench, and before Judgment, the Bail let his Lands for valuable conſideration: And afterwards Judgment was given for the Plaintiff. And now it was debated, whether the Land Leaſed ſhall be liable to the Bailment: and it was ſaid by Glanvill of Councell with the Leſſee, that it ought not to be liable, and he put a difference between a Bailment in this Court, and a Bailment in the Common Pleas, for there the Suit cometh by Original, and the certainty of the debt or demand appeareth in the declaration, and therfore then it is certainly known from the begining of the Bailement for what the Bail ſhall be bound: But in this Court upon the Latitat, there is not any certainty untill Judgment given, before which the Land is not bound, and now it is in another mans hands, and therfore not liable, and he puts Hoes caſe, Co. lib. 5. 70. where it was reſolved that where the Plaintiff releaſeth to the Bail or the Defendant upon a Suit in the Kings Bench before Judgment, all Actions, Duties, and Demands, that this Releaſe ſhall not bar the Plaintiff, for there is not any certain duty by the Bail before Judgment, and therfore it cannot be a Releaſe, and he cites the caſe of 21 E. 3. 32. upon an account, and ſaid that it was like to a ſecond Judgment, in that which reduceth all to a certainty, and therfore &c.

But it was ſaid by Mountague and Crook, that the Leſſee ſhall be bound for otherwiſe many Bailments and Judgments ſhall be defeated, which will bring a great Inconvenience: And Mountague ſaid, that it was like to the caſe of a bargain and ſale of Land, which after it is Inrolled, within ſix moneths ſhall relate to the beginning of the Bargain, ſo upon the Judgment given, relation is made from the time of the Bailment. But Haughton being contra, therfore, Curia adviſare vult.

The ſame Term in the ſame Court.

The Earl of Shrewsburies *Caſe*.

In the diſcretion of the chief Iuſtice to allow a Writ of Error. The entry of a Iudgment how it ſhall relate.

Upon a Verdict, a rule was given to have Judgment, and this was upon the Thurſday, and upon Saturday after the party that was Plaintiff died, and it was moved to have a Writ of Error, becauſe it was ſaid, that the party died before Judgment, in aſmuch as of courſe after the Verdict, and the rule given for Judgment, there are four dates given to ſpeak in Arreſt of Judgment; and ſo as Yelverton Attorney-generall ſaid, he died before Judgment abſolutely given: and he moved the Court to have a Superſedeas: And it was agreed that it was in the diſcretion of the chief Juſtice, Ex officio, to allow a Writ of Error, but becauſe it was a cauſe of great conſequence, he took the advice of the Court, and it was agreed that a Writ of Error was a Superſedeas in it ſelf, yet it is good to have a Superſedeas alſo; and if the Writ of Error had been allowed, the Court could not deny the par-

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ty a Superſedeas: But becauſe the Writ of Error was not allowed, and alſo becauſe no Error appeared to the Court, for where Judgment is entred, this ſhall relate to the time of the rule given: It was reſolved that no Writ of Error ſhould be allowed, nor any Superſedeas granted.

The ſame Term in the ſame Court.

Rones *Caſe.*

IN an Ejectione firmæ brought by the Leſſee of Rone, Incumbent of the Church of Dallinghoe in Com. Suff. It was found by ſpeciall Verdict, that the King was the true Patron, and that Wingfeild entred a Caveat, in vita Incumbentis, he then lying in Extremis, ſcilicet, Caveat Epiſcopus ne quis admittatur, &c. Niſi Convocatus, the ſaid Wingfeild; the Incumbent dies, Naunton a ſtranger preſents one Morgan who is admitted and inſtituted, afterwards the ſaid Wingfeild preſents one Glover who is inſtituted and inducted, and afterwards the ſaid Rone procure a preſentation from the King who was inſtituted and inducted, and then it came in queſtion in the Spirituall Court who had the beſt right, and there ſentence was given that the firſt inſtitution was Irrita vacua & inanis, by reaſon of the Caveat, & then the Church being full of the ſecond Incumbent, the King was put out of poſſeſſion, and ſo his preſentment void: But it was adjudged and reſolved by all the Court for Rone, for 1. It was reſolved that this Caveat was void, becauſe it was in the life of the Incumbent. 2. The Church upon the Inſtitution of Morgan was full againſt all but the King, and ſo agreed many times in the Books, and then the preſentation of Glover was void by reaſon of the ſuper-inſtitution, and therfore no obſtacle in the way to hinder the preſentation of Rone, and therfore Rone had good right: And if the ſecond inſtitution be void, the ſentence cannot make it good, for the Spirituall Court ought to take notice of the Common Law, which ſaith, that Eccleſia eſt plena & conſulta, upon the inſtitution, and the perſon hath thereby Curam animarum. And as Doderidge Juſtice ſaid, he hath by it Officium, but Beneficium comes by the Induction: And although by the Spirituall Law the inſtitution may be diſannulled by ſentence, yet as Linwood ſaith, Aliter eſt in Anglia, who is an Author very well approved of amongſt the Civilians: And Doderidge put a caſe out of Doctor and Student, the ſecond Book: If a man deviſe a ſumm of money to be paid to I. S. when he cometh to full age, and afterwards he ſues for it in the Spirituall Court, they ought to take notice of the time of full age, as it is uſed by the Common Law, to wit, 21. and not of the time of full age as it is uſed amongſt them, to wit, 25. So in this caſe at the Bar, for when theſe two Laws met together, the Common Law ought to be preferred: And when the Parſon hath inſtitution, the Arch-deacon ought to give him Induction: And ſee Dyer 293. Bedingfeilds caſe cited by Haughton to accord with this caſe.

The ſame Term in the ſame Court.

Taylors *Caſe.*

JOhn Taylor a Citizen and Alderman of Gloceſter, was put out of his place by the Common Counſel of the City, for ſome miſdemeanor, and he ſued out

Writ of Reſtitution for an Aldermans place.

a Writ of Reſtitution, and for that the cauſe of his diſplacing was not ſufficient his Writ was allowed, by reaſon wherof the other Alderman who was elected in his place was to be removed, for the number of Aldermen was full: But Hazard another Alderman, to the end that the new elect (who now was Major) ſhould not be diſplaced, was contented to ſurrender his place, in conſideration of 10 l. a year granted to him by the Corporation for term of his life, with which the Wife of Hazard was not content, and therfore he would have left his agreement: And thereupon the queſtion was, whether he might ſurrender, or not: And it was ſaid by Coventree Sollicitor, that he cannot; and he cited Middlecots caſe an Alderman of B. where the opinion of the Court was, 13 Eliz. that he cannot ſurrender: Doderidge, perhaps they would not except his ſurrender: Mountague ſaid, that Alderman Martin of London, gave up his Aldermans place, and without queſtion any man in ſuch a caſe may ſurrender or leave his place, to which the Court agreed, and therfore it was ordered that Hazard ſhall have his 10 l. a year, and that he ſhall ſtand to his firſt agreement.

The ſame Term in the ſame Court.

May *and* Samuels *Caſe.*

Arbitrement.

An action of Debt was brought upon an Obligation, the Condition wherof was to ſtand to the Arbitrement of John S. concerning all matters between them to the time of the ſubmiſſion, who arbitrates that the one ſhall pay 20 s. and that the other ſhall make a generall releaſe to him of all matters, from the beginning of the world to the time of the arbitrement.

Haughton Juſtice, this is an arbitrement but of one part, and therfore void, but if it had been only that the one ſhall pay 20 s. it may be good, for it ſhall be intended that the other by reaſonable conſtruction ſhall be diſcharged or acquitted, to which Crook and Doderidge Juſtices agreed. But by Mountague chief Juſtice, it ought to be ſpecified; yet they all agreed, and ſo it was adjudged that this was a void arbitrement, for it was of the one part only, to wit, that he ſhall pay 20 s. for the other part for the releaſe to the time of the arbitrement was not within the ſubmiſſion; ſo if the arbitrement had been, that the one ſhall make a releaſe, or ſhall be diſcharged or acquitted without ſpeaking of the other, this being on the one part only is a void arbitrement, vide Co. lib. 8. Baſpoles caſe, and 7 H. 6. 40. accordingly.

The ſame Term in the ſame Court.

Vaughans *Caſe.*

THomas Dedham had to Apprentice one Holland, who got his Maid with Child, and afterwards departed from his Maſters Service, and ſtaid a whole night with Vaughan his Kinſman, and Dedham procured a Warrant from S. Stephen Soame a Juſtice of Peace, that the Conſtable ſhould bring the ſaid Apprentice to order according to Law, and becauſe that Vaughan perſwaded him to withdraw himſelf, ſo that he ſhould not be taken by virtue of the Warrant he was indited.

And it was agreed that it was lawfull for Vaughan to lodge and relieve him, albeit he knew his miſdeeds, they being no Treaſon or Felony: But

Haughton

Haughton Juſtice took exception to the Inditement, becauſe no place appeared where he perſwaded him to withdraw himſelf from the Warrant, or in truth that he did hide himſelf from the Warrant, for if he did not ſo, the perſwaſion was nothing.

And Doderidge took another exception to the Warrant, becauſe the Statute ſaith, that two Juſtices, of which one of them ſhall be of the Quorum, ſhall proceed in ſuch caſes againſt the Malefactor, and that they ſhall compell the party to allow means for the education of the Infant, or otherwiſe the Offendor ſhall ſuffer corporall punithment, and ſo this Warrant not being ſpeciall according.

Paſch. 16. Jac. In the Star Chamber.

Wrennums *Caſe*.

SIr Henry Yelverton Attorney-generall, exhibited an Information in the Star Chamber, againſt one Wrennum, Ore tenus, becauſe he had divers times petitioned the King againſt Sir Francis Bacon Lord Chancellor, pretending that the ſaid Lord Bacon had done great Injuſtice to him, in granting an Injunction, and awarding Poſſeſſion of Land againſt him, for which he had two decrees in the time of the former Chancellor: And alſo he made a Book of all the proceedings in the ſaid cauſe between him and one Fiſher, and dedicated and delivered it to the King, in which he notoriouſly traduced and ſcandaliſed the ſaid Chancellor, ſaying, that for this unjuſt decree, he, his Wife and Children were murthered, and by the worſt kind of death by ſtarving: And that now he having done unjuſtly, he muſt maintain it by ſpeaking untruths, and that he muſt uſe his authority, Wit, Art, and Eloquence, for the better maintenance therof, with other ſuch like ſcandalous words: And the Attorney cited a preſident, 2 Jac. Where one Ford for an offence in the like manner againſt the late Chancellor was cenſured in this Court, that he ſhould be perpetually impriſoned, and pay the fine of 1000 l. and that he ſhould ride upon a Horſe with his face to the tail, from the Fleet to Weſtminſter, with his fault written upon his head, and that he ſhould acknowledge his offence in all the Courts at Weſtminſter, and that he ſhould ſtand there a reaſonable time upon the Pillory, and that one of his ears ſhall be cut off, and from thence ſhall be carried to Priſon again, and in the like manner ſhould go to Cheapſide, and ſhould have his other ear cut off, &c. And becauſe they conceived that the ſaid Wrennum had wronged the ſaid Lord Chancellor in the ſaid ſuggeſtion, they all agreed in his cenſure according to the ſaid Preſident: See for ſuch matter, 19. Aſſ. 5. 9 H. 8. Sir Rowland Heywards caſe, and 21 H. 8. Cardinall Wolſeys caſe.

The ſame Term in the Kings Bench.

Mingies *Caſe*.

A Writ of Annuity was brought by Mingy, which was granted, Pro Conſilio impenſo & impendendo, the Defendant pleaded in Bar that he carried a Bill to the Plaintiff, to have him ſet his hand to it, and becauſe he refuſed he detained the ſaid Annuity: And per Curiam this is no plea, for it is

Annuity pro Conſil. impenſo, &c.

is bound to give advice, but not to ſet his hand to every Will, for this may be inconvenient to him.

The ſame Term in the ſame Court.

Notice where requiſite.

The Caſe was this: A Leſſee for years was bound in a Bond to give up the poſſeſſion of the Land demiſed to the Leſſor, or his Aſſigns, at the end of the Term, the Leſſor aſſigns over his Intereſt, and the Aſſignee requires the Leſſee to perform the Condition, who anſwers, that he knew not whether he were the Aſſignee, and therupon refuſeth: And the queſtion was, whether he had broken the Condition, and it was adjudged that he had, for he hath taken upon him ſo to do, and it is not like a Condition annexed to an Eſtate, as Co.lib.5. Mallories caſe, or Co. lib.6. Greens caſe, where the Patron preſented his Clark to a deprivation, yet the Ordinary ought to give the Patron notice of the deprivation; for it is a thing Spirituall, of which a Lay-man ſhall not be bound to take notice.

Deodand.

It was moved, that a man riding upon a Horſe through the water was drowned, and by the Corroners Inqueſt it was found that his death was cauſed, Per curſum aquæ, and the Horſe was not found a Deodand, and per Curiam they did well, for the water, and not the Horſe was the cauſe of his death.

The ſame Terme in the ſame Court.

Wooton *verſus* Bye.

Releaſe of all Demands bars a future Rent.

The caſe was this: A man made a Leaſe for years, rendring Rent, and upon payment of the Rent the Leſſor made an Acquittance, by a releaſe of all Actions, Duties, and Demands, from the beginning of the World to the day of the date: And whether the Rent to come were releaſed by it, was the queſtion: And it was moved by Crook at the Bar, that it was not, for a Covenant in future ſhall not be releaſed by ſuch words, yet a releaſe of all Covenants will be good in ſuch a caſe, as the Book is in Dyer 57. ſo Hoes caſe, Co.lib.5.70.b. ſuch a releaſe will not diſcharge a Bail before Judgment. But it was anſwered and reſolved by the Court, that ſuch a Releaſe will diſcharge the Rent, to come for this word (Demand) is the moſt large and ample word in a Releaſe that may be, as Littleton ſaith, and in Co. lib. 8. Althams caſe, and in Hoes caſe, Co.lib.5. one was Bail for the Defendant, the words whereof are conditionable, Scil. Si contigerit predict. defendent. debit & damna illa prefat. Quer. minime ſolvere, &c. So that before Judment it is altogether incertain, and therfore cannot be releaſed, but in the caſe at the Bar he hath Jus ad rem, though not in re, as Crook Juſtice ſaid.

The ſame Term in the ſame Court.

Bret *verſus* Cumberland.

In a Writ of Covenant the caſe was thus: Queen Elizabeth by her Letters Patents made a Leaſe of certain Mills, rendring Rent, in which Leaſe were

were theſe words, to wit, That the ſaid Leſſee his Executors, Adminiſtrators, and Aſſigns, ſhould from time to time repair the Mills, and ſo leave them at the end of the Term, the Leſſee aſſigns over his Term, the Queen alſo grants over the Reverſion, the firſt Leſſee dies, and the Grantee of the Reverſion brings a Writ of Covenant againſt his Executors; In which caſe there were two points. 1. Whether theſe words. And the ſaid Leſſee his Executors, Adminiſtrators, and Aſſigns, ſhall from time to time, &c. make a Covenant, or no. 2. Whether (as this caſe is) it will lye againſt the Executors of the Leſſee.

Whether Covenant lies againſt the Executor of a Leſſee after aſſignment.

As to the firſt point it was agreed that it is a Covenant, for being by Indenture it is the words of both parties, and it is more ſtrong being in the caſe of the Queen.

Haughton ſaid, that 25 H. 8. Tit. Covenant. Covenant will lye againſt a Leſſee after aſſignment, but Debt lyeth not for Rent after the Leſſee hath accepted the Aſſignee for his Tenant, and therefore it ſeems that by the expreſſe words of the Covenant that the Action lies.

Doderidge Juſtice contra, for between the Queen and the Leſſee there is privity of Contract, and alſo of Eſtate, ſo that the Queen her Heirs and Succeſſors might have had an action againſt the Leſſee or his Executors, upon the privity of Contract; and where the Leſſee aſſigns over, the privity of Contract remains, but the privity of Eſtate is gone to the Aſſignee, and now when the Queen grants over the Reverſion, the privity of Contract is utterly determined, whereby the Action of Covenant cannot be maintained againſt the firſt Leſſee, or his Executors, who are more remote: to which Mountague chief Juſtice agreed, ſee 2 H. 4. 6. 6 H. 4. 1. and Co. lib. 3. Walkers caſe, and the Judgments there cited, Et adjournatur.

The ſame Term in the ſame Court.

Bennet *verſus* Weſtbeck.

THe Caſe was thus: Tenant for life, Remainder for life, Reverſion in Fee, he in Remainder for life gives his Deed of Demiſe (with the aſſent of the firſt Tenant for life) upon the Land to a ſtranger in the abſence of the Leſſor, and ſaid, that he ſurrendred to him in Reverſion: And it was ſaid, that this Surrender being without Deed was not good to him who was abſent, and to confirm it, the caſe was put out of 27 H. 8. Where Mountague chief Juſtice ſaid, that if a Feoffment be made to four, and Livery is made to one in the abſence of the other, but in name of all, if it be by Deed this ſhall enure to all, but if it be without Deed, then only to him to whom the Livery was made: So here this Surrender doth not enure to him in the Reverſion, being abſent.

Whether Tenant for life in Remainder may ſurrender without Deed.

But Non allocatur, for the ſole point now in queſtion, was, whether he in Remainder for life can ſurrender without Deed, and as to it this Rule was taken; viz. That that which cannot commence without Deed, cannot be granted without Deed, as a Rent, Reverſion, common Advowſon, &c. as 19 H. 6. 33. 14 H 7. 3. 1, & 2. Ph. & Mar. 110. 22. Aſſ Pl. 16. But in this caſe this took effect by Livery and not by Deed, and therfore might be determined without Deed.

Mountague and Haughton agreed that it might be ſurrendred without Deed, becauſe it had its beginning without Deed, but it could not be granted over without Deed.

Doderidge Juſtice ſaid, that it could not be ſurrendred without Deed, but he ſaid, that Tenant in poſſeſſion may, or Tenant for life, and he in Remainder together may ſurrender to him in the Reverſion, but this ſhall inure as two ſeverall Surrenders, firſt of him in Remainder to the Tenant for life, and then by the Tenant for life to him in the Reverſion.

Crook Juſtice agreed with Doderidge, for the Eſtate of him in Poſſeſſion is an Eſtoppell to the Surrender, ſo that it could not be ſurrendred without Deed.

The ſame Term in the ſame Court.

Thurman *verſus* Cooper.

IN an Ejectione firmæ brought by John Thurman againſt William Cooper, upon the whole matter the caſe was thus: Lands were given to a man and woman (who afterwards inter-marry) and to their Heirs and Aſſigns, Habendum to them and to the Heirs of their two bodies engendered, the remainder to them and the Survivor of them, with warranty to them and their Heirs and Aſſigns for ever. And the queſtion was what Eſtate this ſhall be? whether an Eſtate-tail or Fee-ſimple? or a Fee-tail with a ſimple Expectant? And it was ſaid that this ſhall be an Eſtate-tail only, for the Habendum qualifies the generall words precedent, and with this agrees Perkins 35. b. and Co. lib. 8. 154. b. Althams caſe: But it was anſwered and reſolved by the whole Court, that this is a Fee-tail with a Fee-ſimple expectant; and they obſerved theſe Rules.

1. That every Deed ſhall be taken moſt ſtrong againſt him that made it.

2. That every Deed ſhall be conſtrued according to the intent of the maker, ſo that all the parts may be effectuall if they can ſtand together with the Rules of Law, 40 E. 3. 5, Percy ſaith, that it is a Fee-ſimple, 21 H. 6. 7. that it is an Eſtate-tail with a Fee-ſimple expectant, Dyer 160. and Plow. Paramore, and Yardleys caſe, the Law ſhall make an order of words where there is no order put by the parties; and the words after the Remainder limited, are Tenendum de Capitalibus Dominis feodi, &c. and therfore it ought to be a Fee-ſimple, for if it were a Fee-tail, he ſhould hold of the Donor, as it is in Co. lib. 6. Sir John Molins caſe, and other Books: And although the Warranty cannot inlarge an Eſtate, yet this expreſſes his intent to paſſe a Fee-ſimple, and the Law ſhall make a conſtruction that the Fee-tail ſhall precede, upon which the Fee-ſimple ſhall be expectant, according to that which is before ſaid, in Paramore and Yardleys caſe.

Doderidge, If the Habendum had been to a ſtranger, the Premiſſes had been but a Tail, as 7 H. 4. for otherwiſe the Habendum ſhall be void: But if Land be given to one and his Heirs (viz. In Tail) or if the ſaid Donee dye without Iſſue of his body, this had been but an Eſtate-tail only, becauſe it immediatly checks and conſtrums the Premiſſes, to which Haughton agreed, Et adjournator.

The

The ſame Term in the ſame Court.

Powels *Caſe.*

POwel an Vtter-Bariſter of the Temple, and alſo Town-Clark of Plimoth, brought an Action upon the Caſe againſt for theſe words; The Defendant ſuppoſing that the Plaintiff had wronged him in the Court of Plimoth, ſaid, that he was a Puritan Knave, a preciſe Knave, a bribing Knave, a corrupted Knave, and that he would make him anſwer for that which he had done in another place: And after Verdict for the Plaintiff, it was now moved in Arreſt of Judgment that the words were not actionable, becauſe he doth not ſcandalize him in his Profeſſion by which he acquires his Living.

Words, *That he was a Puritan Knave, a preciſe Knave, a bribing Knave, a corrupted Knave, &c.*

And Mountague chief Juſtice ſaid, that this word Bribing doth not import that he took a Bribe, and therfore this word and all the other words, but (corrupted Knave) are idle, but theſe words impeacheth him in his Office, for it hath reference to that, and therfore is actionable: And Judgment was given accordingly.

The ſame Term in the ſame Court.

Sir Baptiſt Hickes *Caſe in the Star Chamber.*

SIr Baptiſt Hickes having done divers Pious and Charitable Acts, to wit, had founded at Camden in Glocesterſhire, an Hoſpitall for twelve poor and impotent men and women, and had made in the ſame Town a new Well tunable to others, a new Pulpit, and adorned it with a Cuſhion and Cloath, and had beſtowed coſt on the Sellions Houſe in Middleſex, &c. one Auſtin Garret a Copyholder of his Mannor of Camden, out of private malice had framed and writ a malicious and invective Letter to him, in which in an ironicall and deriding manner, he ſaid, that the ſaid Sir Baptiſt had done theſe charitable works, as the proud Phariſes for vain-glory and oſtentation, and to have popular applauſe, and further in opprobrious manner taxed him with divers other unlawfull Acts: And it was reſolved by the Court that for ſuch private Letters an Action upon the caſe doth not lye at Common Law, for he cannot prove his caſe, to wit, the publiſhing of it, but becauſe it tends to the breach of the Peace it is puniſhable in this Court, and the rather in this caſe, becauſe it tends to a publike wrong, for if it ſhould be unpunished, it would not only deter and diſcourage Sir Baptiſt from doing ſuch good Acts, but other men alſo who are well diſpoſed in ſuch caſes; and therfore (as the Arch-biſhop obſerved) this was a wrong, 1. To Piety, in reſpect of the coſt beſtowed on the Church. 2. To charity, in regard of the Hoſpitall. 3. To Juſtice in conſideration of the Sellion Houſe; and theſe things were the more commendable in Sir Baptiſt, becauſe he did them in his life time: For as Mountague chief Juſtice obſerved, they who do ſuch acts by their Will, do ſhew that they have no will to do them, for they cannot keep their Goods any longer. And he only took a diverſity where ſuch a Letter concerns publike matter as they did, or private in which caſe it is not puniſhable.

Where a private Letter is puniſhable as a Libell.

But the Lord Coke ſaid, that it was the opinion of the Judges in the Lord Treaſurers caſe, when he was Attorney, that ſuch a private Letter was puniſhable

niſhable in this Court, and therupon he had inſtructions to exhibit an Information, but the Lord Treaſurer Jacens in extremis was content to pardon him; and ſo it was reſolved between Wooton and Edwards: And Sir Francis Bacon Lord Chancellor ſaid, that the reaſon why ſuch a private Letter ſhall be puniſhed, is, becauſe that it in a manner enforceth the party to whom the Letter is directed to publiſh it to his friends to have their advice, and for fear that the other party would publiſh it, ſo that this compulſary publication ſhall be deemed a publication in the Delinquent; and in this caſe the party was fined at 500 l.

The ſame Term in the ſame Court.

Bernard *verſus* Beale.

Words, That the Plaintiff had two Baſtards 36. years ſince

AN Action upon the caſe was brought for theſe words; viz. That the Plaintiff had two Baſtards 36. years ago, upon the report wherof he was in danger to have been divorced: And it was reſolved that for Defamation there was no remedy but in the Spiritual Court, if he had no temporall loſſe thereby, and therfore it is not ſufficient to ground an Action to ſay, that he was in danger to be divorced, but that he was De facto, divorced, or that he was to have a preſentment in marriage, as it is in Anne Devies caſe, Co. lib. 4.

The ſame Term in the ſame Court.

Brabin *and* Tradums *Caſe*.

A Prohibition for a Seat in the Church

THe Caſe was, That the Church-wardens of D. had uſed time out of mind to diſpoſe and order all the Seats of the Church, whereupon they diſpoſed of a Seat to one, and the Ordinary granted the ſame Seat to another and his Heirs, and excommunicated all others, who afterwards ſhould ſit in the Seat, and a Prohibition was prayed and granted, for this grant of a Seat to one and his Heirs is not good, for the Seat doth not belong to the perſon, but to the houſe, for otherwiſe when the perſon goes out of the Town to dwell in another place, yet he ſhall retain the Seat, which is no reaſon, and alſo it is no reaſon to excommunicate all others that ſhould ſit there, for ſuch great puniſhments ſhould not be impoſed upon ſuch ſmall Offenders, an Excommunication being *Traditio diabola*.

In the ſame Term in the ſame Court.

Fulcher *verſus* Griffin.

A Parſon covenant that his Pariſhoners ſhall pay no Tithes.

THe Parſon of D. covenanted with one of his Pariſhoners that he ſhould pay no Tithes, for which the Pariſhoner covenanted to pay to the Parſon an annuall ſumm of money, and afterwards the Tithes not being paid, the Parſon ſued him in the Court Chriſtian, and the other prayed a Prohibition: And it was agreed, that if no intereſt of Tithes paſſe but a bare Covenant,

tenant, then the party who is sued for the Tithes hath no remedy but a writ of Covenant: And the better opinion of the Court in this case was, that this was a bare Covenant, and that no interest in the Tithes passe.

The custody of a Copyholder that was a Lunatick, was committed to I.S. and for Trespasse done upon his Land, it was demanded of the Court in whose name I.S. should bring the action, and their opinion was, that it should be in the name of the Lunatick. *Darcies* case in the Common Pleas.

Trinity 16. Jac. In the Kings Bench.

The Earl of Northumberlands *Case*.

The Earl of Northumberland being seised of the Manor of Thistleworth, in which he had a Leet to be holden twice a year, to wit, within a moneth after Easter, and a moneth after Michaelmas, and Henry Devell being a Free-holder of the said Manor erected a new Dove-coat at Heston within the Precinct of the said Leet, which was presented at the Leet for a common Nusance, for which Devell was amerced 40s. and was commanded to remove it upon pain of 10 l. for the which a Distresse was taken by Henry Sanders and others, as Bailiffs to the said Earl, whereupon Devell brought a Replevin, and they made Avowry and justified as Bayliffs, and prescribed that they used to make by-laws to redresse common Nusances, and also prescribed in the Distresse. And the point in question was, whether the new erecting of a Dove-coat by a Free-holder were a common Nusance, & punishable in the Leet: And it was resolved by the whole Court upon great deliberation, viz. Mountague chief Justice, Crook, Doderidge and Haughton Justices, that it was not a common Nusance, either punishable or inquirable in a Leet; and by Haughton a man hath *Jus proprietatis & privilegii* in the Doves. 1. Propriety in respect of the place, as 22 H. 6. 39. Trespasse lies for taking a Goshawk in respect of the place, as 3 H. 6. 55. For Hares, and Spencers case in Dyer, and so of other things which are Feræ naturæ. And if a Deer goes out of a Park, albeit it be in the Kings case, yet it is lawfull for the Owner of the Soil to take it, if it be in the place where the Deer hath chase and re-chase: And by the Register and Fitzherbert it appears that Trespasse lies Quare columbare fregit, & Columbas cepit: But 16 E. 4. 7. Trespasse doth not lye for killing of Doves, but there is a Quære of an action upon the case, and because the Doves be no Trespasse, neither is there any remedy for the killing of them, therefore they are no common Nusance; for by Brook 34 H. 6. Brooks action upon the case, the common custom is the common Law, and there is no authority against it, but Co. lib. 5. 104. Boulstons case, which is only an Obs, and is not agreeing with the reason of the principall, and this confirms my opinion, Quod fiat concessum per totam Curiam, for there the principall case was that a man made Conyburrows, and the Conies strayed into his Neighbours grounds, and adjudged that it was not actionable; but it was lawfull for any man to kill them upon his own ground; so here, &c. Whether the erecting of a Dove-coat be a common Nusance.

Doderidge. It may be a hurt to the Common-wealth, but not a publike Nusance, for that ought to be immediate, or generall.

1. Immediate it cannot be, for the erecting of a Dove-coat cannot in it self be a Nusance.

2. It is not generall but particular to the Neighbouring Inhabitants: And it hath been allowed of all sides, that a man may have a Dove-coat by

preſcription, which could not be if it were a Nuſance; to which Mountague agreed: And it is lawfull for any man to kill the Doves upon his own Land, but they muſt be ware that they do it not againſt any Statute, for Doves are preſerved by many Statutes, as by the Statute of Wales, made in the time of E. 1. and the Statute of 18 E. 2. gives directions that the killing of Doves ſhall be preſented at the Leet: And the Statute of 18 Eliz. ordains that Doves ſhall not be ſhot.

3. However the Replevin lies for a fault in the pleading, for the harm and nuſance which the Doves do is laid to be Per totam patriam, whereas it ought to be within the Precinct of the Leet; to which Mountague agreed.

Crook, A man hath property in the Doves only by the Poſſeſſion, for being at large, they are Nullius in bonis, and when they are in his poſſeſſion, to wit, in the Dove-coat, they do no harm to any: and it was lately ruled in this Court, that a man cannot lay Loggs in the Kings high way, although there be ſufficient room for Paſſengers, becauſe it is a wrong to have the high way ſtrained; ſo here a Preſcription ſhould not be good if it were a Nuſance, for it is all one to erect a great Dove-coat, or a little one, for a Nuſance Non recipit magis aut minus: And Bolſtons caſe rather confirms then encreaſeth my doubt, and ſo I agree with my Brethren.

Mountague, A man hath Jus duplex in Doves. 1. Jus proprietatis. 2. Jus privilegii, for they fly to and again, and (as Bracton ſaith) have Animum revertendi, and ſo have not other things which are Ferox naturæ: And it is a good Argument that this matter was never queſtioned, for it is without queſtion. Littleton ſaith in the caſe of Diſparagement, 21 E. 3. 4. They of the Leet ought to enquire of ſuch things as have been enquirable, yet the exceſſe therof is reſtrainable by the Juſtices of Aſſiſe.

Exceſſe of Dove-coats reſtrainable by the Juſtices of Aſſiſe.

A Precipe lies of a Dove-coat, as appears by the Verſe, Mich. Col. and Dower and Partition lies therof, which ſhews it to be lawfull, and by the Book of 17 E. 4. 7. It ſeems that it is not lawfull to take Doves: And as a man cannot preſcribe to do a Nuſance, ſo the King cannot licence one to do it: And therfore I agree that Judgment ſhall be given for the Dove-coat.

The ſame Term in the ſame Court.

Richardſon *verſus* Cabell.

Richardſon, being a Parſon, libelled againſt Cabell in the Spirituall Court for Tithes, becauſe the ſaid Cabell being an Inn-keeper, took all the benefit of his Paſture by putting in Gueſt Horſes into his Paſture, wherupon Cabell prayed a Prohibition, and it was not granted, for it is Tithable in this caſe: But if Cabell had taken a crop of Hay, and afterwards he had put Gueſt Horſes into the Paſture, in that caſe it had not been Tithable, for he had his Tithe before, and therby it ſhould ſeem that ſome Crop is not Tithable.

Where tithes ſhall be paid for graſſe of gueſt Horſes.

The

The ſame Term in the ſame Court.

Southern *verſus* How.

RAlph Southern Plaintiff in an Action upon the Caſe againſt Robert How, ſhews for his caſe, That the Defendant being a Goldſmith in London, and having Counterfeit Jewels, knowing them to be counterfeit, ſent William Saldock his Servant with them to the Plaintiff, being a Merchant in Barbary, to uſe him for the ſale of the Jewels to the King of Barbary, and the Plaintiff thereupon ſold them to the King of Barbary for 800 l. and Saldock having received the ſaid money, went from thence; And the Jewels being afterwards diſcovered to be counterfeit, the Plaintiff was taken and enforced by Impriſonment to make reſtitution of the money to the ſaid King. But it was ſaid by the Court, that the Verdict did not prove the caſe, for it was found that the Defendant did not command his Servant to make uſe of the Plaintiff, nor to ſell to the King, but generally to any: And that the Jewels were of ſome worth, Scil. 80 l. And it was agreed at the Bar, by Davenport, that in this caſe the action well lies, for the Maſter ſhall anſwer for his Servant, Dyer 151. the Lord Norths caſe, 5 E. 4. 1. the Sheriff ſhall be amerced for the ill return of his Bailiff: And if I command my Servant to kill one, who commands another, in this caſe the Maſter ſhall not be puniſhed, but in Treſpaſſe all are principals, and 2 H. 4. 18. If a Servant burns his Maſters houſe, wherby another houſe is burnt, there the Maſter ſhall anſwer for it, for 14 H. 8. 31. b. an Action upon the caſe lies where there is no other action provided for ſuch a thing, ſo that an action well lies in this caſe, and ſee Doctor and Student 137. in what caſe the Maſter ſhall anſwer for his Servant.

Where a Maſter ſhall be anſwerable for his Servant, and where not.

Coventry Solicitor, to the contrary, for it was lawful for the Plaintiff to command his Servant to ſell them, for it was found by the Verdict that the Jewels were of ſome worth and value, and he did not command him to ſell them for more then they were worth, and 9 H. 6. 53. b. If the Maſter ſend his Servant into a Fair, or Market, to Merchandize for him, the Maſter ſhall not be puniſhed for his fault. And in this caſe the command was not to deal with the Plaintiff, or to ſell to any one in particular, and for it ſee 9 H. 6. aforeſaid: And if the Servant will exceed the lawfull command of his Maſter, the Maſter ſhall not be puniſhed therfore, but if the command be unlawfull it is otherwiſe, 11 E. 4. 6. A man ſells cloath of ſuch a length, which proves to be ſhort of the length, an action lies not without a Warranty, ſo Fitz. N. B. 64. c. For Wine if it be warranted to be good, an action lies if it be corrupt. If my Beaſts go into another mans Soil, an action lies againſt me, but if my Servant drive my Beaſt into another mans Soil, I ſhall not be puniſhed, for he doth this of his own wrong, without any ſuch warrant from me, 13 H. 7. b. And if when a man ſell a thing for more then it is worth, an action would lye for it, we ſhould never have an end of actions. And the action doth not lye for another reaſon, becauſe it doth not appear that the King of Barbary did lawfully impriſon the Plaintiff, 26 H. 8. 3. If a man makes a Leaſe, and covenants that he ſhall not be diſturbed, if a ſtranger diſturb him, an action lieth not againſt the Covenantor, ſo here, &c. for it ſeems it was Ex regali poteſtate, and not in a lawfull manner, and ſo he concluded that the action will not lye, and ſo it was reſolved by the whole Court.

Mountague chief Juſtice, the Plaintiff is no party who ſhall have the action,

action but the King of Barbary. 2. The Verdicts contrary to the Declaration, and Jewels are in value according to the eſtimation, and therefore 38 Eliz. between Simſon and Sanders in the Star Chamber, it was reſolved that a man ſhall not be puniſhed for Perjury upon the valuation of Jewels.

Doderidge ſaid, that 22 Eliz. an action upon the caſe was brought in the Common Pleas by a Clothier, that whereas he had gained great reputation for his making of his Cloath, by reaſon whereof he had great utterance to his great benefit, and profit, and that he uſed to ſet his mark to his Cloath, whereby it ſhould be known to be his Cloath: And another Clothier perceiving it, uſed the ſame mark to his ill-made Cloath on purpoſe to deceive him, and it was reſolved that the Action did well lye.

The ſame Term in the ſame Court.

A *Certiorari* granted into *Wales.*

Upon an Indictment of Barretry before the Juſtices of Wales, a Certiorari was moved for to remove it into this Court: And it was ſaid at the Bar that it had not been ſeen from the time of E. 1. that ſuch a Writ had been granted in the like caſe, and therefore he collected that it ought not to be granted: But it was reſolved by the Court, that a Certiorari ſhould be granted, in regard it is in the Kings caſe; and by Haughton Juſtice, notwithſtanding the Statute Quod communia placita non ſequantur Curiam meam yet it is plain, that the King may ſue in what Court he will: And albeit this Writ in ſuch a caſe ought not to be granted in caſe of a common perſon, yet that is no reaſon but that it may be granted in the caſe of the King.

The ſame Term in the ſame Court.

Sir Henry Glemhams *Caſe.*

A Plea not to be amended in another Term, without aſſent of parties.

In a Quo warranto againſt Sir Henry Glemham for uſing certain Liberties, to which Sir Henry pleaded in Bar, and the Kings Attorney replyed, and ſo this matter reſted three years, and then the Kings Attorney put in a new Replication, and joyned Iſſue upon other points: And it was moved for the Defendant that he might put in a new Bar, in regard the Replication is altered, and nothing was entred, but all remained in paper: And it was agreed by the Court that the King ſhall not be concluded but that he might put in his Replication at any time; And that the King cannot make a double Plea, for the other party ſhall anſwer firſt to one, and then to the other: And the Court would not allow Sir Henry to make a new Bar in this caſe, without the aſſent of the Attorney, who would by no means agree to it: And in caſe of a common perſon, this ſhall not be allowed without the aſſent of parties.

The ſame Term in the ſame Court.

Lamb and Wooll included in ſmall Tithes.

In an Action of Trover and Converſion between one Nicholas and William Ward, it was agreed that tithe Lamb and Wooll was included within ſmall Tithes: And Mountague ſaid, that a Vicaridge endowed might be appropriated but not to the parſon, to which Haughton and Doderidge agreed, 31 H. 6. Fitz. tit. Indicavit, is that ſuch a Vicaridge may be diſſolved:

ſolved: An appropriation may be by the King ſole where he is Patron, but there is no Book that it might be by the Patron ſole. Grindons caſe in Plowden, and 17 E. 3. 39. An Appropriation cannot be without the Kings licence.

The ſame Term in the ſame Court.

Blaxton *verſus* Heath.

IN an Action of Debt by Blaxton againſt Heath, the caſe was this. A man poſſeſſed of a term for twenty years, in right of his Wife, made a Leaſe for ten years, rendring rent to him, his Executors, and Aſſigns, and died. And the queſtion was whether the Wife ſhall have the rent after his death, or his Executors, and it was argued, that the wife ſhould not have it, becauſe ſhe was in by a Title Paramount; as if there be two Joynt-tenants for life, the one makes a Leaſe for years rendring rent, and dies, the other ſhall not have the Rent, Dyer 167. and ſo of Joynt-tenants in fee, Co. lib. 1. *96.* and Perkins accordingly: To which Mountague chief Juſtice agreed, for he ſaid, it was but an extract of ten out of twenty, the remainder continuing as before: And Redditus is Reventus, a turning again, but it is otherwiſe of a Condition, which is a new Creature, of which the wife ſhall take no advantage.

Crook Juſtice, This is a ſpeciall reſervation, and therfore the Executor ſhall have it, and not the wife, for ſhe comes in Paramount, as in the caſe of Joynt-tenants: Haughton agreed therunto, and ſaid, that the Rent ſhall be incident to him who hath the Reverſion under the Leſſor, who is the Executor: And Mountague demanded of Hobert chief Juſtice of the Common Pleas, his opinion in this caſe, who agreed that the wife ſhall not have it.

The ſame Term in the ſame Court.

Dennis *verſus Sir* Arthur Mannaring, *and others.*

IN the great caſe between Gabriel Dennis Plaintiff, in Treſpaſſe againſt Sir Arthur Mannaring and Brimblecomb, and others, the Verdict was found for the Defendants: And now it was moved in Arreſt of Judgment for the Plaintiff, becauſe no Bail was entred for Brimblecomb one of the Defendants, for every Defendant is ſuppoſed in Cuſtodia Mareſcalli, and in this caſe the Venire facias is awarded to try the Iſſue between the Plaintiff and Defendants, where one of the Defendants is no party in Court: And Serjeant More put the caſe of the Lord Chandoys and Sculler, and other Defendants, where the Judgment in ſuch a caſe was reſolved to be erroneous.

A Verdict is given in B. R. before any bail entred, not good.

Mountague, we ought Diſcernere per legem quid ſit juſtum, and here Brimblecomb being no party in Court, no Verdict could be given.

Doderidge, I have ſeen in this Court, where upon a Writ of Error brought in ſuch a caſe, we have compelled him to put in his Bail, becauſe he

ſhould not take advantage of his own wrong and folly: But becauſe that here no fraud appeared to be in the Plaintiff, he ſhall not be bound to ſtand to the Verdict: Haughton agreed, but Crook ſeemed to the contrary: But it was agreed, that if Brimblecomb had appeared at the Suit of any other, the ſame Term, it had been ſufficient: And theſe Books were cited to be in the point, 32 H.6.2. 8 E.4.5. 21 H.6.10.

The ſame Term in the ſame Court.

Hide *verſus* Whiſtler.

Exception of all Wood, under-wood, Coppices and Hedgerows.

William Hide made a Leaſe for years of certain Lands to Whiſtler, excepting to the Leſſor all his Wood and under-wood, Coppices and Hedgerows; and in a Replevin the queſtion was, whether the Soil ſhall paſſe thereby: for the Leſſee put his Beaſts into a Coppice, and the Leſſor diſtrained them, whereupon, &c. And the words of the exception were further, ſtanding, growing, and being in and upon the Premiſſes: And the Leſſee covenanted to make Fences, but if the Leſſor made new Coppices, that the Leſſee ſhould not make Fences about them. And it was ſaid, that a Coppice ſignifies a parcell of Land fenced for the ſafegard of young Trees. And it was ſaid for the Plaintiff, that Premiſſes are Pre dimiſſa, and by theſe words, growing, and being in the Premiſſes, it ſhall be intended that the Soil did not paſſe, for it is pre-demiſed: But it was reſolved that the Soil it ſelf was excepted by the exception of the Wood and Coppice, 14 H.8.1. The Biſhop of Londons caſe, Co.lib.5.Ives caſe, and lib.11.Lyfords caſe: And by the reſerving of a Coppice the Soil it ſelf is reſerved; for by Mountague, that which is reſerved is not demiſed, and ſo the Diſtreſſe well taken. Crook agreed, and he ſaid the difference was good between Wood and Trees, for by the excepting of Wood, the Soil it ſelf is excepted, otherwiſe of Trees: Haughton agreed that the Soil it ſelf is excepted in this caſe, and ſo it was adjudged.

A Coppice, what it is.

The ſame Term in the ſame Court.

Talbot *verſus Sir* Walter Lacen.

Covenant to leave the Premiſſes in reparations at the end of the Term.

In a Writ of Covenant brought by Margaret Talbot againſt Sir Walter Lacen, upon a Leaſe made by the Plaintiff to the Defendant, of a Park, &c. for five years, if ſhe ſhould live ſo long, in which the Leſſee covenants for him, his Executors and Aſſigns, to keep the Premiſſes in good Reparations, and ſo to leave them at the end of the Term, and alſo to deliver to the Plaintiff (upon notice given) four Bucks, and four Does in ſeaſon, during the life of the Plaintiff, in every of the ſaid years: And after the expiration of the aforeſaid term of five years ſhe brought a Writ of Covenant, and aſſigned the breach, becauſe that in the end of the term he committed Waſt, and becauſe that after the end of the term the Defendant refuſed to deliver the Deer; And albeit the words of the delivery of the Deer are, during the life of the Plaintiff, yet they are alſo every of the aforeſaid years, and therefore it was reſolved that ſhe ſhall not have them during her life in this caſe.

And

And for the other point it was objected, that in Fine termini, was incertain, for it may extend after the term, but Ad finem termini had been ſufficient, Old book of Entries, 169. for when he covenants that at the end of the term, he would leave the Premiſſes in reparations, and Ad finem termini, he did waſt, this ought of neceſſity to be intended a breach of the Covenant, and therfore it was adjudged that the action of Covenant well lies.

Mich 16. Jac. In the Kings Bench.

Havergall *and* Hares *Caſe*.

IN this Caſe (which ſee before, fol. 1. b.) four points were obſerved. Before fol. 1. b

1. Whether Fiſher the Aſſignee of the Rent were ſuch a perſon who ſhall take benefit of the entry?

2. When 10 l. is only in arrear, whether the Rent of 20 l. ſhall be ſaid in arrear?

3. Whether theſe advantages which were firſt granted with the Rent may be granted over?

4. When the Uſe ſhall riſe, whether upon the firſt Indenture of the grant of the Rent, or afterwards? For the caſe was, that the Grantee of the Rent of 20 l. covenanted by the ſame Indenture, that if the ſaid rent of 20 l. were in arrear for the ſpace of twenty daies after any day of payment, that the Grantee ſhall diſtrain, and if there be not ſufficient diſtreſſe upon the Land, or if there be a Reſcous, Replevin, or Pound-breach, that then it ſhall be lawfull for the Grantee and his Heirs to enter into the ſame Land, and to retain it untill he be ſatisfied: And the ſaid Rent was granted, 9 Jac. it was arrear, 11 Jac. the Fine for the better aſſurance of the Rent was levied 12 Jac. and 13 Jac. the Diſtreſſe was taken.

There were four Cauſes which give an entry, and upon the Diſtreſſe and Replevin brought the Aſſignee enters. As to the three firſt points, it was reſolved by the whole Court,

1. That Fiſher was ſuch an Aſſignee who ſhall take benefit of the Entry.

2. When 10 l. is only arrear, the Rent of 20 l. ſhall be ſaid arrear, wherupon there ſhall be a Title of Entry.

3. That theſe advantages granted with the Rent may be granted over.

And as to the fourth point, it was holden by Mountague and Crook, that the Uſe riſeth upon the firſt Indenture, and not upon the entry after the Replevin brought, although the words are, that then it ſhall be lawfull for the Grantee and his Heirs to enter, wherby the uſe is only awaked, as it is in the principall point in Shelleys caſe, and although a Fine is afterwards levied, yet the Uſe ſhall be directed by the originall Indenture, and therfore 6 Rich. 2. A Feoffment is made to two and their Heirs, and afterwards a Fine is levied upon it for further aſſurance, to the uſe of them and the Heirs of one of them, yet it ſhall go to the uſe of both, for it ſhall be reſpected according to the original agreement, where there are divers aſſurances for the perfecting of one and the ſame thing, 16 E. 3. tit. Age. A Daughter had a Seigniory by deſcent, a Tenancy Eſcheats, a Son is born, he ſhall have the Land, ſee Sharoes caſe in 4 Mar. Dyer, and in Chadleighs caſe all looks to the originall agreement, and therfore variance of time ſhall not hinder the originall agreement, as 33. Aſſ. the Servant intends to kill his Maſter, and afterwards the Maſter puts him out of his Service, and then he kills him, this ſhall be petty Treaſon in the Servant, 28 H. 6. Two are bound in a

Bond

Bond at ſeverall times, and yet he ſhall declare againſt both, as upon the firſt delivery, 11 H.7. it is adjudged, that if a Deed be delivered by an Infant, and afterwards it is again delivered when he comes of full age: And ſee Mallories caſe, Finches caſe, and Boraſtons caſe, Nunc & tunc & quando, are a demonſtration of the time, and not of the matter, and ſo they concluded that the Uſe ſhall riſe upon the firſt Indenture, and not upon the Fine or Replevin brought; but Doderidge and Haughton Juſtices contra.

Trin. 17. Jac. In the Kings Bench.

Silveſters *Caſe.*

JOhn Silveſter promiſed to John B. that if he would marry his Daughter, that he would give with her a Childs part, and that at the time of his death he would give to her as much as to any of his Children, excepting his eldeſt Son, and afterwards he made his Executors and died: I. B. brought an action upon the caſe againſt the Executors upon this Promiſe, and ſhewed that the Executor had not given him a Childs part, and that ſuch a younger Son of the Teſtators had a 100 l. given him: And it was reſolved by the Court that the promiſe of a Childs part is altogether incertain, but being ſo much as any of his Children had, and then ſhewing that the younger Son had a 100 l. this was certain enough, and therupon Judgment was given for the Plaintiff.

The ſame Term in the ſame Court.

Godfrey *and* Owen.

Words. *He is a very Varlet, and ſeeks to ſuppres his brothers will, &c.*

COrnelius Godfrey was Plaintiff in an action upon the caſe for words againſt Owen Defendant, and the words were theſe, to wit, He is a very Varlet, and ſeeks to ſuppreſſe his Brothers Will, he makes ſhew of Religion, but he is a very Hypocrite: And the words were ſpoken of a Merchant, to one who gave him much credite in his Trade.

Mountague chief Juſtice ſaid, that the words which are actionable in ſuch a caſe ought to touch the Plaintiff in his Profeſſion, which theſe do not do, Et relata ad perſonam intelligi debent ſecundum conditionem perſonæ, for in the ſuppreſſing of his Brothers Will the caſe might be ſuch that he might well do it, for perhaps there may be an after Will made; And for calling him Hypocrite lies not in the conuſance of the Common Law, for GOD only can judge of the heart of man, and therfore theſe words do not touch the Plaintiff as he is a Merchant.

Doderidge Juſtice, Words ought to tend ſome way to the ruine of the party, or otherwiſe they are not actionable; and Judgment was given, Quod quere nil capiat per billam.

Mich.

Mich. 17. Jac. In the Star Chamber.

Sis John Bingleys *Caſe.*

IN Sir John Bingleys caſe in the Star Chamber, it was reſolved by the two chief Juſtices, Mountague and Hobart, and agreed by the Lord Verulam Lord Chancellor, and Sir Edward Coke, that if an Information be exhibited there which begins with divers particular miſdemeanours, and concluder in the generall that, 1. The matter included in the generall charge ought to be Ejuſdem generis. 2. They ought to exceed the particulars expreſſed in number. 3. They ought not to be greater or more capitall; whereupon Mountague cited the Statute which ſpeaks of Deans and other Spirituall perſons, upon which it hath been reſolved that Biſhops are not within it, for they are of a higher degree, and the principall reaſon of theſe rules was, becauſe that a man cannot poſſibly make a defence, becauſe he knows not what will be objected againſt him; and upon this Sir John Bingley was diſcharged at this time for the moſt tranſcendent Offence that was objected againſt him, to wit, concerning Captain Baugh, and other Pirates to whom the King of his grace and bounty had given 200 l. to make them Loyall Subjects: But Sir John Bingley, Colore officii, had defrauded them of almoſt all of it, for the want whereof ſome of them died miſerably, and the reſt became Pirates again. But Sir John Bingley made many proteſtations of his innocence in this matter.

An Officer of his own wrong.

And it was holden alſo that one might be an Officer of his own wrong, as their might be an Executor of his own wrong: And this was Sir John Bingleys caſe for ſomthing in the information, for he committed Extortion, Colore officii.

The ſame Term in the Star Chamber.

THe Attorney-generall put in an Information againſt divers Dutch Merchants, for buying and tranſporting of many great ſumms of Gold and Silver Bullion.

And it was ſaid by the Court that divers Statutes had been made for redreſſe of this miſchief, as the Statute of 5 R. 2. the Offenders whereof ought to forfeit all they may: and by another Statute in 17 E. 4. this Offence was made Felony to continue for ſeven years: But the Court would not now puniſh them upon any Statute, for it was an offence at common Law, and therefore puniſhable in this Court.

To carry Gold and Silver out of the Realm, puniſhable at Common Law.

And Sir Edward Coke ſaid, that if any be to be puniſht upon a penal Statute, it ought to be within two or three years at leaſt after the offence committed, for the Informer hath but a year to ſue, and the King two years for the moſt part.

The Statutes of 37 E. 3. and 5 E. 6. Prohibite the buying of Coin, and that it is ſo at the Common Law, ſee 21 E. 3. 60. and Plow. 215. and not only he that buyes but he that ſels alſo offends in it, for it is a Prerogative only belonging to the King, and it is his Coin, and none can put a value upon it but himſelf, which is a Flower of his Crown.

Hobart chief Juſtice of the Common Pleas, as one ſhall be puniſhed for ingroſſing any Commodity, a Fortiori, one ſhall be puniſhed for ingroſſing and buying of a great quantity of money, all other Commodities being thereby

ingroſſed, for money is the Miſtreſſe of commerce: Pecunia eſt rerum omnium vendendarum menſura, Bracton 117. 18 E. 3. Hollingshead 109. 50 E. 3. Rot. Pat. Memb. 7. And for tranſportation, 17 E. 3. & 19 E. 3. Rot. Pat. 24. De monetis non tranſportandis, 19 R. 2. Rot. Pat. The Dutches of obtained licence to melt Coin to make Plate. And divers of the Defendants were within the Kings generall pardon, but in as much as they pleaded it in their Rejoynder, and not in their anſwer (as it ought to be) the Court over-ruled their Plea, ſo that they could have no advantage therby. But in as much as they were ſtrangers, and not conſuant of our Laws, and relyed only upon their Counſell, the Court had conſideration therof in their cenſure.

Hillary, 17 Jac. In the Kings Bench.

Serle *verſus* Mander.

Words, I arreſt you upon Felony.

SErle brought an action upon the caſe againſt Mander for theſe words, to wit, I arreſt you upon Felony, and after Verdict for the Plaintiff, it was moved in Arreſt of Judgment by Richardſon that the words were not actionable, for he doth not ſay, that the Plaintiff had committed Felony; But it was reſolved by the Court, and ſo adjudged that the action lieth.

The ſame Term in the ſame Court.

Judgment againſt a Defendant when beyond Sea with an Ambaſſador reverſed.

A Judgment was obtained againſt one of the Servants of the Lord Hay, Viſcount Doncaſter, when he was Ambaſſador in Bohemia, and attending upon him there: And this matter being diſcloſed to the Court by the Counſell of the Defendant, they would not ſuffer the Plaintiff to have execution upon the ſaid Judgment, but ordered the Plaintiff to declare De novo, to which the Defendant ſhould preſently anſwer.

Imparlance.

Memorand. It was ſaid to be againſt the courſe of the Court, to have an Imparlance before the Declaration entred.

The ſame Term in the ſame Court.

The King *againſt* Briggs.

A Subject cannot have a Foreſt.

A Quo warranto was brought by the King againſt Briggs, for exerciſing of certain Privileges, who juſtified by virtue of a Foreſt granted to him: And by Bridgeman, this is the firſt Quo warranto which he knew that had been brought againſt any Subject for a Foreſt, for a Subject cannot have a Foreſt, but he may have a Chaſe, which peradventure may paſſe under the name of a Foreſt. And there are divers incidents to a Foreſt which a Subject cannot uſe nor have; there ought to be a Juſtice of a Foreſt which a Subject cannot have, and ſuch a Juſtice ought to be a man of great Dignity. 2. There ought to be Verderors who are Judges alſo, and by 34 E. 1. Ordinatio Forreſtæ ought to be by Writ, but a Subject cannot award a Writ. Alſo there are three Courts incident to a Foreſt.

1. A Court of Attachments which may be without Verderors.
2. The Swanimate Court.
3. The

3. The Juſtice ſeat, and this appeareth in 1. E. 3. cap. 8. 21 E. 4. cap. 8: But by the Statute of 27 H. 8. cap. 7. There are ſome other incidents to a Foreſt. 2. Admits that a Subject may have a Foreſt, yet it fails in this caſe, becauſe he hath ſhewn the exemplification and not the Letters Patents, and ſee Co. lib. 5. Pains caſe, that neither an exemplification, or conſtat, are pleadable at Common Law, and Co. lib. 10. Dr. Leyfeilds caſe.

The ſame Term in the ſame Court.

Sir William Webb *verſus* Paternoſter.

The caſe was this; Sir William Plummer licenſed Sir William Webb to lay his Hay upon the Land of the ſaid Sir William Plummer untill he could conveniently ſell it, and then Sir William Plummer did make a Leaſe of the Land to Paternoſter, who put in his Cattell and they eat up the Hay: And it was two years between the licenſe and the putting in of the Cattell, and yet Sir William Webb brought an action of Treſpaſſe againſt Paternoſter for this.

Mountague chief Juſtice: 1. This is an Intereſt which chargeth the Land into whoſoever hands it comes, and Webb ſhall have a reaſonable and convenient time to ſell his Hay. 2. The Leſſee ought to give notice to Sir William Webb of the Leaſe before he ought to put in his Cattell; to which Houghton Juſtice agreed in both points: But Doderidge Juſtice ſaid, that Sir William Webb had no certain time by this licenſe, yet he conceived that he ought to have notice: But it was reſolved that the Plaintiff had a convenient time (to wit, two years) for the removing of his Hay, and therefore Judgment was given againſt him. But admit that there had not been a convenient time, yet the Court was of opinion that the Plaintiff ought to have incloſed the Land at his perill, for the preſervation of his Hay: And it was agreed that a licenſe is countermandable, although it be concerning profit or pleaſure, unleſſe there be a certain time in the licenſe, as if I licenſe one to dig Clay in my Land, this is evocable, and may be countermanded although it be in point of profit, which is a ſtronger caſe then a licenſe of pleaſure, ſee 13 H. 7. The Dutches of Suffolks caſe for a licenſe.

Notice.

Convenient time.

A licenſe whether for profit or pleaſure countermandable.

The ſame Term in the ſame Court.

Sibill Weſterman brought an action upon the caſe againſt Everſall, and had Judgment: and in the entry of the Judgment ſhe was named Iſabell, 1 Aſſ. and 3. Aſſ. A Fine was levied by Sibill, when her name was Iſabell, and it was not good, for it doth not appear to be the ſame party; ſo in the caſe at the Bar: And for this the Judgment was reverſed.

Error. *Sibell* for *Iſabell*.

The ſame Term in the ſame Court.

Jene as Executor of brought an action upon the caſe againſt Cheſter, becauſe the Defendant made requeſt to the Teſtator of the Plaintiff to buy for him certain ſilk Stuffs for Apparrel, and to make him a Cloak; the Defendant pleaded that he was within age, and George Crook ſaid, that the Defendant ſhould not be charged, becauſe it is not ſhewn that the Apparell was for the Infant himſelf, but he was overruled in this, for it is ſufficiently

An Infant chargable for neceſſary Apparell.

ciently expreſſed to be for him. And it was agreed by the Court, that it ought to be ſhewn that it was Pro neceſſario veſtitu, and it ought to be ſuitable to his calling, and (as Doderidge ſaid) that there was a caſe adjudged in this Court between Stone & Withipole, that where Withipole had taken of Stone certain Stuffs for Apparrel, being within age, and afterwards he promiſed payment if he would forbeare him ſome time, and the Aſſumpſit adjudged not good, becauſe he was not liable for the Debt at firſt for the reaſon aforeſaid.

Trin. 17. Jac. In the Common Bench.

Gilbert de Hoptons *Caſe.*

Words. *Thou art a Theef and haſt ſtoln my Furze.*

AN action upon the caſe was brought for theſe words, viz. Thou art a Theef and haſt ſtoln my Furze: And after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that theſe words were not actionable: But it was ſaid on the other ſide, that to ſay, thou art a Theef, is actionable, and the ſubſequent words are in the Copulative, and enure as a confirmation of the precedent words: But if it had been for, Thou haſt ſtoln my Furze, this had been an explanation of the precedent words, and therfore in that caſe the action would not have been: And it was anſwered and reſolved by the Court that the word (and) in ſome caſes ſhall be taken as the word (for) and ſo it ſhall be in this caſe, and therfore adjudged that the action lies.

Mich. 22. Jac. In the Star Chamber.

Fines in the Star Chamber for killing the Kings Deer.

TWo men came Ore tenus into the Star Chamber, for ſtealing of the Kings Deer, and were fined a 100 l. a peece, and three years Impriſonment, unleſſe it would pleaſe the King to releaſe them ſooner, and before they ſhould be releaſed of their Impriſonment to be bound to their good behaviour: And it was obſerved by the Attorney-generall that the offence was the greater, in regard that the King had but one darling pleaſure, and yet they would offend him in that: And it was ſaid by ſome of the Court that it was a great folly and madneſſe in the Defendants to hazard themſelves in ſuch a manner for a thing of ſo ſmall value as a Deer was. The Lord Preſident ſaid, that Mr. Attorney was the beſt Keeper the King had of his Parks, in regard he brings the Offenders into this Court to be puniſhed: The Lord Keeper ſaid, that the Defendants in ſuch a caſe being brought Ore tenus are not allowed to ſpeak by their Counſell, and yet theſe men have had their Counſell, but it was Peters Counſellors, meaning, their ſorrow and contrition at the Bar, which much moved him, ſo that if his vote might prevail he would ſet but 20 l. fine upon them.

In the ſame Term in the ſame Court.

THe Lord Morley and Sir Richard Mollineax being beyond Sea, their Sollicitor in their names exhibited a ſcandalous Bill in the Star Chamber againſt the Biſhop of Chichiſter, and after their return this continued ſo for three years, without any diſclaiming therof by them, and now the matter

ter being queſtioned, they ſaid, that it was not done with their privity: But becauſe they had not diſclaimed the Fact before, they were fined a 100 l. to the King, and a 100 l. to the Biſhop for Damages, and the Bill was to be taken of the File.

The ſame Term in the ſame Court.

Lewes *Plaintiff verſus* Jeoffreys, *and others Defendants.*

The Plaintiffs Brother had been a Suitor to a woman, which matter proceeded to a Contract, and afterwards the Defendant Jeoffreys hapned to be a Suitor to her alſo, wherupon (being Rivalls) they fell out, and the Plaintiffs Brother called the Defendant Jackanapes, which was taken very ill by the Defendant (being a Juſtice of Peace in the County of Worceſter, and the other being but a mean man in reſpect of him) ſo that he told him that if he would meet him on Horſe-back he would fight with him: afterwards one of the Sons of the Defendant went to the ſaid Brother (being upon his own Land, and gave him a mortall wound, wherupon a friend on the behalf of the party wounded, came to the Defendant (being a Juſtice of Peace) and brought him a peece of his Skull, to the end that his Son ſhould be forth coming at the next Aſſiſes, declaring to him the danger of death the man was in; wherupon the Defendant took a Recogniſance of 10 l. of his Son and of his ſureties of 5 l. a peece to anſwer this at the nert Aſſiſe: And in the mean time the party died of the ſaid wound, and the Son did not appear at the Aſſiſes, and the Judges of Aſſiſe fined the Defendant 100 l. for taking ſuch ſlender ſecurity for the appearance of his Son, which was paid, and yet notwithſtanding the Defendant was fined 200 l. more for this offence and alſo 200 l. for his miſdemeanor in his challenge, albeit the Defendant was of the age of 63 years, and ſo it ſeems that he intended to fight with him. But he being a Juſtice of Peace (who is Conſervator pacis) he did againſt his oath to do any thing which may tend to the breach of the Peace.

A Challenge fined in the Star Chamber.

And for the other matter it was ſaid by the Court, that the Defendant being Father to the offendor, it had been better for him to have referred this matter to another Juſtice of Peace, or at leaſt to have had the aſſiſtance of another: And the party being in ſuch great danger of death, his ſon was not bailable.

Hillary 1. Car. In the Kings Bench.

Bowyer *verſus* Rivet.

The caſe was thus; Sir William Bowyer 12. Jac. recovered againſt Sir Thomas Rivet in an Action of debt, Sir William made his wife his Executrix and died, the wife made Bowyer her Executor and died; then Sir Thomas Rivet died, Bowyer brought a Scire facias to have execution upon the Judgment againſt Sir Thomas Rivet the younger, as Heir apparant to the Land to him deſcended from Sir Thomas Rivet, who pleaded Riens per deſcent from Sir Thomas Rivet, and it was found that he had two acres and a half of Land by diſcent; and it was prayed by Goldſmith, that Judgment might be given againſt Sir Thomas Rivet generally, for he ſaid, that this falſe Plea ſhall charge him and his own Lands, and cited Plowden

440. where in debt againſt an Heir, upon his falſe Plea, his own Lands ſhall become liable to the debt, and Co. lib. 3.11. b. Sir William Herberts caſe, where the caſe was upon a Scire facias againſt the Heir, as it is in this caſe.

But on the other part it was argued by Richardſon the Kings Serjeant, Banks, and all the Juſtices, that Execution ſhall be awarded in no other manner againſt the Heir then it ſhould be againſt his Anceſtor, or other Purchaſor, to wit, of a Poyety of that which he had by diſcent, for as much as in this caſe he cannot be to this purpoſe charged as Heir, but he ought to be charged as Ter-tenant and as a Purchaſor, and a Purchaſor ſhall never hurt himſelf but his falſe Plea.

And Banks argued, that the Heir in this caſe is charged as a Purchaſor, and the falſe Plea of a Purchaſor ſhall never charge himſelf, 33 E. 3. Fitz. Execution, 162. and 6 E 3.15. and that in this caſe he is charged as Ter-tenant appears by three reaſons.

1. Debt will not lye againſt an Heir, but where he is bound as Heir, but in this caſe Execution is to be ſued againſt him as another Ter-tenant, Dyer 271. 11 E.3.15. and in 27 H.6. Execution 135. and Co.lib.3.12.b. That in Judgment upon Debt or Recogniſance the Heir is charged and Execution ſhall be ſued againſt him as Ter-tenant.

2. There is not any lien as Heir, for the Judgment doth not mention the Heir, and therfore he cannot be charged unleſſe he be expreſly bound, and in the Record of the Recovery, it doth not appear that the firſt lien ſhall bind the Heir, for he declares that he bound himſelf, and not that he bound himſelf and his Heirs.

3. If the Heir were bound in the Obligation ſo that he were once bound as Heir, yet the Judgment determines the ſpecialty, ſo that now he is not bound, and in the Judgment the Heir is not mentioned, as in 10 H. 4. 21. 24. If an Abbot contract to the uſe of the houſe without conſent of the Covent, this ſhall bind if he dies, but if he takes an Obligation of the Abbot and then he dies, this ſhall not bind the houſe, for the Contract is determined by the Obligation, and this is the reaſon that in the time of E. 3. in a recovery upon debt the Obligation was cancelled.

Where a debt is recorded upon bond the Obligation was cancelled.

4. Here he cannot be charged as Heir, for it appeareth by the Record that his Father is living, for it is brought againſt him as Heir apparant, which he cannot be but during the life of his Father.

And as to the objection, that in this caſe he ſhall have his age, and therfore ſhall be charged as Heir, Non ſequitur, for if execution be ſued againſt the Heir of a Purchaſor, he ſhall have his age, and yet he is not Heir, neither can charged as Heir to the Conuſor: But becauſe it is a rule in Law, that the Heir which hath by diſcent ſhall not anſwer where his Inheritance may be charged during his Nonage.

Whitlock to the ſame intent, becauſe the Heir is not charged here as Heir but as Ter-tenant, wherby his falſe Plea ſhall not hurt him, with which Jones alſo agreed, and ſaid, that he here conſidered three things.

1. That the lien of the Anceſtor binds the Heir.

2. How the Heir ſhall behave himſelf in pleading.

3. Our point in queſtion. For the firſt there are two things requiſite to bind one as Heir. 1. A lien expreſſe, for if one bind himſelf and not his Heir, this ſhall not bind his Heir in any caſe. 2. A diſcent of Inheritance, for without this he ſhall not be bound by the act of his Anceſtor, and he is bound no longer then Aſſets diſcend, for he alien before the Writ purchaſed the lien is gone. 2. He ought to behave himſelf truly and plead truly, and confeſſe the aſſets diſcended to him, when debt is brought againſt him as heir, otherwiſe his own Lands ſhall be charged with the debt, as it is in Pepys caſe in Plow.Com. But where it is ſaid in Pepys caſe; that upon a Nihil dicit,

or

or Non ſum informatum, &c. If the Judgment paſſe upon them, that it ſhall be generall; I am not of that opinion, for the common experience of the Courts is, that ſuch a generall Judgment ſhall not be given againſt the Heir; unleſſe it be upon a falſe plea pleaded, with which agrees Lawſons caſe, Dyer 81. and Henninghams caſe, Dyer 344. where the Judgment paſſed by Nihil dicit, ſo that the ſaying in Plow. 440.a. that what way ſoever the Heir be condemned in debt, if he do not confeſſe the Aſſets, &c. that it ſhall be his proper debt, is not now taken for Law.

And I alſo hold, that if the Heir plead falſly, and there is found more Aſſets, that yet it is in the election of the Plaintiff to charge him and to take execution of the Aſſets only, or to take an Elegit of all his Land, and he is not bound to take an Elegit of all his Land in this caſe, for otherwiſe this inconvenience may ariſe: If the Heir hath a 100. acres by diſcent, and two by purchaſe, if upon the falſe Plea of the Heir the Plaintiff cannot have any other execution but an Eligit of the Moyety of his Lands, then he by this is prejudiced, for otherwiſe he might have all he Aſſets in execution, and ſo the Heir by this way ſhall take advantage of his falſe plea. 3. He held as Whitlock before, and for the ſame reaſon Doderidge Juſtice: How the Heir ſhall be bound by the act of his Father, is worthy of conſideration, upon which Prima facie the Books ſeem to diſagree, but being well conſidered, accord with excellent harmony. I have conſidered this caſe, it was moved at Reading Term, and becauſe my Notes are not here, I will ſpeak more briefly, and will conſider,

Where upon a falſe plea by an Heir, the Plaintiff may elect to take the Aſſets in execution or an *Elegit* of all his Land.

1. How an Heir ſhall be charged upon the Obligation of his Father: and as to that in debt againſt an Heir, he is charged as Heir, ſo that at this day it is taken as his proper debt, wherby the Writ is in the Debet and Detinet, but in the Detinet only againſt Executors: But in former time from the 18. of Ed. 2. till 7 H. 4. if an Executor had Aſſets, the Heir was not chargable, but in 7 H. 4. the Law changed in this point, for now it is accounted his own debt, and debt will lye againſt his Executor, as it is ſaid in Plow: Com: and ſo againſt the Heirs of the Heir to many generations, albeit of this Plowden makes a doubt, and his plea that he had nothing at the day of the Writ purchaſed, nor ever after, is good, for if he alien the Aſſets he is diſcharged of the debt, in regard he is not to wait the action of the Obligee.

How an Heir ſhall be charged upon the Obligation of his Father.

2. The Heir ſhall be charged upon or Recogniſance, not as Heir, but as Tertenant, for he is not bound in the Recogniſance, but only the Conuſor grant that the debt ſhall be levied of all his Lands and Tenements, but not againſt his Heirs. And here he is not meerly as Tertenant, for he ſhall not have contribution againſt other Tertenants, but only againſt thoſe who are Heirs as himſelf is, but to all other intents he is Tertenant, and ſo charged, as 32 E. 3. and 27 H. 6. are.

Why an Heir is not chargable for debt, after he hath ſold the aſſets.

3. That upon a Judgment (as our caſe is) the Heir ſhall be charged as Tertenant and not otherwiſe: The Book which hath been cited, viz 33 E. 3. Execution 162. is expreſſe in the point; the broken years of Fitzherbert are obſcurely reported, but by comparing of caſes it will appear to be our caſe expreſſly.

4. That albeit an Heir ſhall be charged upon the Obligation of his Anceſtor, where he is particularly bound, yet upon his falſe plea no execution ſhall be but upon the aſſets: So it ſeems to me that in the principall caſe the Judgment ſhall be ſpecial, and it ſeems to be a very plain caſe.

Crew chief Juſtice agreed, and in his argument he affirmed what Jones ſaid, that a generall Judgment ſhall not be given againſt the Heir, if he do not plead falſly that he hath no Aſſets, and not upon Nihil dicit: And ſo Judgment was given that the Plaintiff ſhall have Execution of the Moyety of the Lands diſcended to the Defendant; and ſo note the diverſity of debt againſt the Heir, and Scire facias againſt the Heir. Dickenſon

Dickenſon *verſus* Greenhow, Hill. 1. Car. In the Kings Bench, Intr. Hill. 10. Jac. Rot. 189.

IN an Attachment upon a Prohibition, the Plaintiff declared that where Robert the laſt Abbot of Cokerſham in Lancaſhire, was ſeiſed in Fee of three acres of Land, parcel of his Monaſtery, and that the Abbot and his Com-monks, and all the Predeceſſors of the Abbot were time out of mind of the order and rule of Præmonſtratenſes, and that the order of Præmonſtratenſes, and all Monks therof, were time out of mind diſcharged of payment of tithes for their Lands and Tenements, Quamdiu manibus propriis aut ſumptubus excolebant. And that the ſaid Abbot and all his Predeceſſors time out of mind had holden the ſaid three acres diſcharged of payment of Tithes, Quamdiu, &c. and ſo held them untill the diſſolution of the Monaſtery, and ſhew the ſurrender to H.8. and the Statute of 31 H.8 by force wherof H.8. was ſeiſed and held them diſcharged, and from him derive them to E.6. and from E.6. to Queen Mary, and from her to Queen Elizabeth, and from her in the 42. year of her Raign to Wagſtaff, and from him by mean conveyances to Dickenſon the Plaintiff, Quorum pretextu he was ſeiſed, and enjoyed them in Propria manurantia, and ſhew the Statute of 2 E. 6. cap. 15. whereby it is enacted that Tithes ſhall be paid as uſually they were, &c. Quorum pretextu, the Plaintiff held the three acres diſcharged of Tithes, and that notwithſtanding; and againſt the Prohibition, the Defendant did draw him into Plea for them in Court Chriſtian, and the Judge therof held plea, and the Defendant did there proſecute, him to the diſinheriſon of the Crown: And upon this the Defendant demurred, and prayed a conſultation. And Sir John Davies the Kings Serjeant argued for the Defendant, that a Conſultation ſhould be granted, becauſe that his matter of diſcharge is double.

1. His Priviledge. 2. The preſcription, and if either of them will not help him, then he ought to be charged: For the Priviledge, he took it that the Præmonſtratenſes never had ſuch a priviledge. It is a Maxime in Law, that all perſons ought to pay Tithes, and all Lands ſhall be charged with them of common right; but alſo there are divers diſcharges of them and allowed by our Law (as is manifeſt by the orders of Templers, Hoſpitalers, and Ciſtertians, which diſcharges our Law allows) and theſe are, 1. By preſcription. 2. By reall compoſition. 3. By priviledge obtained, and that by two wais.

All Lands chargable with Tithes.

1. Either by the Bull of the Pope, for he taking upon himſelf to be the great Diſpenſer and Steward of the Church, took upon him to diſcharge them, but this (as it is holden by the Canon) he could not abſolutely do, but might divert them to a Clergy-man, or grant to another to hold them by way of retainer, and this ought to be to a Clergy-man alſo. Or,

2. By a generall Counſell, for ſome orders were diſcharged by generall Counſels: So ſome obtained Priviledges by the Popes Bulls, which are his Patents, ſome by Counſels which are as his Statutes, and Decrees were as Judgments, but yet none of them had ever any force in our Law, nor did bind us in England more then voluntarily retained and approved by uſage and cuſtom, for as it is ſaid in 11 H 4. the Pope cannot alter the Law of England, and this is evident, for in all caſes where the Bulls or Conſtitutions of the Pope croſſe the Law of the Land, they have alwaies been rejected; as for inſtance,

The Popes Bulls of four ſorts.

1 In the Bulls which are of four ſorts.

1. Of Proviſion.

2. Of Citation.

3. Of

3. Of Exemption. And 4. Of Excommunication. And as for thoſe of Excommunication, it appeareth that it was Treaſon at Common Law, and that the Treaſurer did kneel to E. 2. for one who brought them in, and in the perpetuall courſe of the Books afterwards, they have alwaies been diſallowed in Pleas. So his Bulls of Citation, before the Statute of Proviſion was a hainous offence, and ſo are Bulls of Proviſion and Exemption. For his Canons, where they were againſt the Law they were neglected. It appeareth by the Canon, Quod nullus capiat beneficium a Laico, and yet notwithſtanding continued long after for Benefices, and does yet for Biſhopricks, that the Clergy ſhall take them from the King and a lay-hand: And alſo there is a Canon for exemption of Clarks out of tempozall Juriſdiction: but yet as Brian ſaith, 10 H. 7. 18. it was never obſerved here. So the Canon ſaith, that the time of the Laps ſhall be accounted Per ſeptimanas, but our Law not regarding this, ſaith, that it ſhall be accounted Per menſes in the Calender, as it is expreſly adjudged in 5 E. 3. Rot. 100. Rot. clauſ in turri: And there is a great reaſon for it, as it is in 29 H. 3. memb. 5. in turri. It is not neceſſary for Biſhops of England to go to generall Councells; ſo as in Parliament thoſe that do not lend Knights or Burgeſſes ſhall not be bound by Statutes. And the Counſels of Lyons, of Bigamis, &c. are expounded by Statutes how they ſhal be taken; ſo that if they have a Priviledge (as in truth they have) by the Popes Bulls, if it were not allowed in England, they are not of force to priviledge them againſt the Common Law of the Land for payment of Tithes; but this was never here allowed.

And now for the Preſcription this cannot help them, for Monks are not of Evangelicall Prieſthood, to wit capable of Tithes in the Pernamy, but meerly Lay-men, and then as the Biſhop of Winchesters caſe is, they cannot preſcribe in non decimando; And Bede ſaith of them, that they are Merè laici, ſo that if their Priviledge were allowed, their Preſcription will not help them. The priviledge of Præmonſtratenſes was by the Counſell generall of for their diſcharge, which denies that all religious perſons ſhould be diſcharged of Tithes of Lands in their own hands, Quamdiu, &c. But afterwards Adrian reſtrained it to Templars, Hoſpitalars, and Ciſtertians, omitting the Præmonſtratenſes; and the decree of Adrian was received alſo, wherby the Law took notice of the diſcharge of the ſaid three Orders. True it is, that the Præmonſtratenſes have a Bull of Pope Innocent the third, of diſcharge, and as large liberties as the Ciſtertians, but they never put this in ure: And it ſeems, 1. That there were of them 29 Abbots & Abbys, and yet their priviledge is not mentioned in all the Books as the Ciſtertians is. 2. They complained to Gregory the nineth, that they were not ſuffered to put it in ure, and notwithſtanding this complaint and command of the Pope to the Clergy to allow them this priviledge, yet 24 H. 3. Complaint was made againſt them in Parliament for claiming this priviledge: But the Statute of 2 H. 4. cap. 4. put this out of doubt, for this put the Ciſtertians in a præmunire, for purchaſing and putting in execution Bulls of exemption of their Lands purchaſed afterwards.

Now if the Præmonſtratenſes had the ſame priviledge they ſhould not have been omitted out of this Statute; then comes the Statute of 7 H. 4. cap. 6. which terrifies all from putting in execution Bulls of Exemption of their Lands not put in execution before, upon which it is not to be preſumed that it was put in execution afterwards.

But admit that the Præmonſtratenſes had this priviledge: I ſay, that the Plaintiff hath not applied this priviledge to himſelf, for he hath not averred in fact that at the time &c. Propriis manibus excolebat, nec ad firman demittebat; And this he ought to have done if he would take advantage of the priviledge

vileᵈge, as in Dickenſons caſe, Novel lib. intr. 542. there it is expreſly alledged in the like caſe, as ours is here, and where the ſame priviledge as here is claimed, Quod manibus propriis excolebat.

True it is that it is ſaid here, that after the Feoffment to him made, he was ſeiſed Et gaviſus fuit in propria manutenor, but he doth not ſay, that at the time of the Tithes due, gaviſus fuit, &c. as he ought expreſly to have done, as appeareth by other caſes.

If one preſcribe to have common in arable Land when the Corn is reaped, or in Meadow where the Hay is carried away, and juſtifie by reaſon therof he ought to aver that the Corn or Hay was carried away when he put in his Cattell, otherwiſe he hath not applied the preſcription to himſelf.

So if one juſtifie for Common Quandocunque audia ſua jerint, he ought to aver that his Cattell then went in the place where, &c. as 17 Aſſ. 7. So if the King pardon all but thoſe who adhere to M. he who plead it ought to aver that he did not adhere to M. ſo here the priviledge is Quamdiu propriis manibus, &c. and therfore at the time he ought to aver that he had it propriis manibus, &c.

Alſo where upon the ſurrender to H. 8. and the Statute, they conclude that the Queen held it diſcharged, this cannot be, for this ought to be in ſuch manner as the Abbot held it diſcharged, but this was quamdiu, &c. and the King cannot be bound to ſuch an unbeſeeming condition, and therfore he ſhall hold it diſcharged: Like to the caſe where the Abbey hath the preſentation, and another the nomination, the Abbey ſurrender, he who hath the nomination ſhall have all, for the King ſhall not preſent for him, it being a thing undecent for his Majeſty, and ſo he concluded for the Defendant.

Banks contra. 1. That it is a good cauſe of Prohibition. 2. That it is well applied to us.

1. That the order of Præmonſtratenſes is diſcharged of Tithes, that they had once this priviledge, hath been allowed by the other party, by the Bulls of the Pope, and that it was allowed and taken notice of, he proved by this that this Bull was confirmed by King John in the 24. year of his Raign, the Charter wherof he ſaid he had under Seal, and 22 E. 1. membran. 5. there were 26. Abbeys of this order, and the King took them all into his protection with their Immunities, and 22 Rich. 2. John de Gant having Jura Regalia in Lancaſhire (where the Abbey is) confirmed to them this Bull, and alſo this hath been divers times allowed and decreed to them in Court Chriſtian for ſuit of Tithes, as in the caſe of the Abbey of Bigham which was of the ſame order.

And as to that which was objected, that if the Præmonſtratenſes had ſuch a priviledge as the Ciſtertians in 2 H. 4. that the like proviſion would have been againſt them.

As to this I anſwer, that ſuch a proviſion is not againſt the Templars nor Hoſpitalars, and yet they have ſuch a priviledge.

2. It may be that they never enlarged their priviledged above their grant. And for the Statute of 7 H. 4. our Priviledge was not then new, and it was afterwards allowed in 22 R. 2. And alſo I conceive, that if the Abbey were diſcharged at the time of the diſſolution, although not De jure, yet this is a ſufficient diſcharge within the Statute of 31 H. 8. as it is taken Co. lib. 11. 14.

2. I hold that they may here preſcribe to be diſcharged of Tithes, becauſe they are Spiritual perſons, and capable of cure of Souls, and capable of tithes in Pernamy, as if an Appropriation be made to them.

3. It is not now to be argued, whether they have ſuch a priviledge, for they have demurred, which is a confeſſion of all matters in Fait, &c.

4. If

4. If there be a matter wherupon the Prohibition may be grounded it will ſerve. vide Dyer 170,171. Co.lib.11.10.

And 5. The priviledge is well applied, becauſe it is ſhewn that they were once diſcharged.

6. He needs not to ſhew how he is diſcharged, 22 E.4.4. 5 E.4.8.20 E.4.15. Alſo the diſcharges are temps dont, &c. and therfore not pleadable; ſo he prayed that the Prohibition might ſtand.

Paſch. 1. Car. In the Kings Bench.

Bowry *verſus* Wallington.

NOte that in this caſe upon the Statute of 50 E.3.4. it was agreed by the Court, that if there be a Suit in the Eccleſiaſticall Court, and a Prohibition awarded, and afterwards Conſultation granted, that upon the ſame Libell no Prohibition ſhall be granted again, but if there be an Appeal in this caſe then a Prohibition may be granted, but with theſe differences.

1. If he who appeals pray the Prohibition, there he ſhall not have it; for then Suits ſhall be deferred in infinitum, in the Eccleſiaſticall Courts.

Where ſeverall Prohibitions may be granted in the ſame caſe, and where not.

2. If the Prohibition and Conſultation were upon the body of the matter and the ſubſtance of it, for otherwiſe he ſhall be put many times to try the ſame matter, which is full of veration. And the caſe was moved again, and argued by Noy, which was thus.

Wallington libelled in the Eccleſiaſticall Court againſt Bowry for tithes of Wool and Lamb, and Bowry upon ſuggeſtion of a Modus derimandi obtained a Prohibition, and had an Attachment, and declared upon it, and are at Iſſue upon the Modus, which is found for the Defendant, and Conſultation granted, wherupon Judgment was given in the Eccleſiaſticall Court againſt Bowry, upon which Bowry appealled, and prayed a new Prohibition, and had it, and Noy moved for a Conſultation. 1. Becauſe that a Prohibition and an Attachment upon it are but one Suit, for the contempt of the party in bringing his Suit in another Court, and tranſlating this from the Kings Court, and when it is once tried for the Defendant, the ſame thing ſhall not be tried again. And as to the Statute of 50 E 3.4. upon the miſtake wherof the miſtake is raiſed, he confeſſed that the Printed Books, and alſo in the Extract of the Parliament, one Roll remaining in the Tower is (the ſame Judge) but the Parliament Roll it ſelf, and the Petition is, Liceatque Judici Eccleſiaſtico ſive dioceſi eidem an hujuſmodi, and the anſwer to the Petition is, one Conſultation granted ſufficeth in this caſe: And the Parliament Roll it ſelf was brought into the Court and viewed, but he ſaid, that if it were as it is in the printed Book and Extract, the ſame Judge ſhall not be intended the ſame perſonall Judge, but the ſame Judge of Conuſance of the ſame Juriſdiction or cauſe, for otherwiſe, if another Commiſſary be made, as the Biſhop may when he will, his Succeſſor may be newly prohibited, and alſo one thing may be infinitely tried, for in many places the Suit begins in the Arch-deacons Court, and from him an Appeal may be brought to the Biſhop.

The

The ſame Term in the Kings Bench.

Pack *verſus* Methold *in a Writ of Error.*

IN Mich. Term, 22 Jac. Methold brought an action upon the caſe in the Common Pleas againſt Pack, and declared that in conſideration that the Plaintiff would pay to Playford 52 l. 14 s. to the uſe of the ſaid Pack, ſuch a day, &c. Pack promiſed to deliver to him his Bond (in which he was bound to him in the ſaid ſumm) when he ſhould be thereunto requeſted: And ſhews that he had paid, &c. and the Defendant did not deliver to him the Bond, albeit the ſame to do he was afterwards often times requeſted, and upon non aſſumpſit pleaded, it was found for the Plaintiff, and now it was moved in Arreſt of Judgment, becauſe the requeſt is not laid ſpecially, nor the day nor place thereof expreſſed. But the Court, to wit, Hobart chief Juſtice, Hutton and Harvey gave Judgment for the Plaintiff, and yet they agreed, that if he had demurred upon the Declaration, it had not been good, and alſo that if it had been generall, Licet ſæpius requiſit, it had not been good, in as much as it is parcell of the promiſe, and therfore ought to be laid ſubſtantially; viz. That it was after the promiſe and payment of the 52 l. but the time is ſupplied by theſe words Poſtea, and there is no defect but in the place, and (Poſtea) implies that it was after the promiſe and payment.

And Hobart ſaid, that all the points of the Declaration which have matter and ſubſtance are good, only there wants the place where the requeſt was made, which by the Iſſue is moved, and the requeſt is here well notified to the Court, and the defect of the place is now helped by the Statute.

Hutton ſaid, that if the promiſe had been to pay ſo much upon requeſt at Eaſter, there the day ought to have been ſhewn, and (Poſtea) had not been ſufficient, but here the Poſtea refers only to a thing whereby it is certain; and he ſaid, that upon this Iſſue ſuch a requeſt ſhall be given in evidence.

Harvey ſaid, that the requeſt being here laid as it is, the Court may well give Judgment: And it ſeemed to Hobart that ſuch a requeſt cannot be given in evidence where the Iſſue is upon an Aſſumpſit: And Judgment was given for the Plaintiff; and afterwards a Writ of Error, Hill. 1. Car. was brought in the Kings Bench, and the opinion of the Court was ſtrongly, that the Plaintiff ought to have alledged the requeſt ſpecially and certainly in time and place, becauſe it is traverſable and parcell of the Aſſumpſit, and not to be done but upon requeſt.

Where in an action upon the caſe, there ought to be a ſpeciall requeſt, and where not.

Jones Juſtice remembred divers Preſidents in the point, and further day was given to bring in Preſidents of either ſide, and two Preſidents were produced according to the opinion of this Court, Scil. Paſch. 30 Eliz. Rot. 464. in 1. Court, Old and Eſtgreens caſe, Trin, 16 Jac. Rot. 268. Wales caſe.

But in Debt Licet ſæpius requiſit is ſufficient, for it is not materiall nor traverſable, for the bringing of the action of Debt (which is a Precipe) is a ſufficient demand in it ſelf, and afterwards at another day the Court continued of the ſame opinion, and therfore the Plaintiff in the firſt action brought a new action, Quod nota, for albeit the Defendant had pleaded non aſſumpſit, and Iſſue was joyned upon it, yet this did not amend the evill laying of the requeſt, according to the Preſidents abovеſaid.

Paſch.

Paſch. 2 Car. In the Kings Bench, int. Hill. 1 Car. Rot. 135.

Conſtable *verſus* Clobery.

IN an action of Covenant, the queſtion was upon the Traverſe; the Plaintiff declared upon the Indenture of Covenant, and the Covenant was that a Ship ſhall go with the next fair wind, and that the Merchant ſhall pay ſo much for fraught: the Defendant ſaith by way of traverſe, that he did not go with the next wind, and it was obiected by Stone of the Temple, of Counſell with the Plaintiff, that the Traverſe was not good, but he ought to have traverſed that the Ship did not go at all, for that which is materiall ſhall be traverſed, and that the Ship did not go is the moſt materiall thing here, and this appeareth by 15 E. 4. 2. where a Gift in tail is traverſed, and not the death of the Tenant in tail, 19 H. 8. 7. 36 H. 6. 16. 2 H. 5. 2. 2 H. 7. 12. and there are caſes to this purpoſe, Co. lib. 7. 9. Ughtreds caſe: If a man intitles himſelf to Land by an Eſtate which cometh by Condition, he ought to ſhew that the Condition is performed: A Covenant againſt a Covenant will not make an Eſtoppell, but he ſhall bring his action, 3 H. 6. 33. Where he ought to ſhew that he went to Rome, becauſe it is a precedent Condition: The principall caſe in Ughtreds caſe prove other, to wit, that which is materiall is allegable: And the difference upon the caſe of 48 E. 3. 3. 4. Where A. Covenant with B. to ſerve him with three Eſquires in France, and B. covenant for it to pay him 42. marks, he may chuſe to covenant in generall or ſpeciall, as he will, for there was Covenant againſt Covenant, and here there is a Covenant of one part to go with the Ship, and on the other part to pay ſo much for the Fraught, and ſo Covenant againſt Covenant.

And it ſeemed to Doderidge Juſtice, that the Traverſe is not good, for the Traverſe here is by permiſſion of God.

And for another thing where Merchants covenant to pay joyntly and ſeverally, according to the quantity of the Wares, there an action of Covenant may be brought againſt one alone, for the Deed is ſeverall.

And by Crew chief Juſtice, it cannot be a good Traverſe, for a circumſtance cannot be traverſed, for wind is alterable, and a thing materiall is only traverſable, and here the Covenant is ſeverall for their ſeverall Fraughts, and it may be that others have paid him.

Jones Juſtice, the traverſe is not good; and for the other matter he cited Mattheuſens caſe, Co. lib. 5. 22. Where upon a Charter party if one ſeal be broken all is gone. If three are bound joyntly, and an action is brought againſt one, and it appeareth that others have ſealed, the Writ ſhall abate: But in this caſe an action lies againſt him alone, although the other be named in the Indenture.

The ſame Term in the ſame Court, intr. Hill. 22. Jac. Rot. 1019.

Millen *verſus* Fandrye.

AN action of treſpaſſe was brought for chaſing of Sheep, the Defendant pleaded that they were treſpaſſing upon certain land, and he with a little Dog chaſed them out, and as ſoon as the Sheep were out of the land he called in his Dog, and upon this the Plaintiff demurred; The point ſingly was but thus; J chaſe the Sheep of another out of my ground, and the Dog purſues them into another mans land next adjoyning, and J chide my Dog, and Juſtification in treſpaſſe.

and the Owner of the Sheep brings treſpaſſe for chaſing of them: And it was argued by Whiſtler of Grays-Inne, that the juſtification was not good, and he cited Co. lib. 4. 38. b. that a man may hunt Cattell out of his ground with a Dog, but cannot exceed his authority, and by him an authority in Law which is abuſed is void in all, and to hunt them into the next ground is not juſtifiable. The Books differ, if Cattell ſtray out of the high way involuntarily, whether Treſpaſſe lies, 7 H. 7. 2. and H. 7. 20. but all agree, that they ought to be chaſed out as haſtily as may be.

Littleton argued for the Defendant, that Cattell may be chaſed out into another mans ground, and he ſaid that a man cannot have ſuch a power upon his Dog as to recall him when he pleaſeth, and a Dog is ignorant of the bounds of Land, and he reſembled this caſe to other caſes of the Law; firſt to 21 E. 4. 64. In Treſpaſſe of Cattell taken in A. in D. the Defendant ſaith, that he was ſeiſed of four acres called C. in D. and found the Cattell there Damage feaſant, and chaſed them towards the Pound, and they eſcaped from him and went into A. and he preſently retook them, which is the ſame Treſpaſſe, and admitted for a good plea: and 22 E. 4. 8. In treſpaſſe the Defendant juſtifies by reaſon of a cuſtom that they which plow may turn their Plow upon the Land of another, and that for neceſſity, and it was allowed for a good juſtification, and he hath more government of his Oxen, then in our caſe he can have of his Dog.

If a man be making of a lawfull Chaſe, and cannot do it without damage to another, this is Damnum abſque injuria, 21 H. 7. 28. And he cited a caſe which was in Mich. 18 Jac. between Jenning and Mayſtore, where a man of neceſſity chaſed Sheep for taking one of his own, in treſpaſſe he may juſtifie it: And alſo if a Dog goes into the Land of another (as in this caſe) treſpaſſe does not lye, but otherwiſe it is of Cattell.

Crew chief Juſtice, it ſeems to me that he might drive the Sheep out with the Dog, and he cold not withdraw his Dog when he would in an inſtant, and therfore it is not like to the caſe of 38 E. 3. Where treſpaſſe was brought for entring into a Warren, and there it was pleaded that there was a Pheaſant in his Land, and his Hawk flew and followed it into the Plaintiffs ground, and there it ſeems that it is not a good juſtification, for he may purſue the Hawk, but cannot take the Pheaſant, 6 E. 4. a man cuts Thorns, and they fell into another mans Land, and in treſpaſſe he juſtified for it; and the opinion was, that notwithſtanding this juſtification treſpaſſe lies, becauſe he did not plead that he did his beſt endeavour to hinder their falling there, yet this was a hard caſe; But this caſe is not like to theſe caſes, for here it was lawfull to chaſe them out of his own Land, and he did his beſt endeavour to recall the Dog, and therfore treſpaſſe does not lye.

Doderidge Juſtice agreed, for here was no hedge, and when he ſaw them out of his own ground, he rated the Dog, 12 H. 8. this difference is taken, if I ſee Sheep in my Land, I may chaſe them out, but if another ſees them and chaſe them out, I may have treſpaſſe againſt him, becauſe he hath taken away my advantage; and the nature of a Dog is ſuch that he cannot be ruled ſuddenly, and here it appeareth to be an involuntary Treſpaſſe, 8 E. 4.

For an involuntary treſpaſſe action doth not lye.

A man is driving Goods through a Town, and one of them goes into another mans houſe, and he follows him, treſpaſſe doth not lye for this, becauſe it was involuntary, and a treſpaſſe ought to be done voluntarily, and ſo it is Injuria, and a hurt to another, and ſo it is Damnum.

If Deer be out of a Foreſt, the Owner of the Land where they are may hunt them, and if the Deer flye to the Foreſt, and the Hounds purſue him, then he ought to call in the Dogs, and ſo I may juſtifie, and treſpaſſe lies not.

In the time of chief Juſtice Popham, this caſe was adjudged in this Court.

Treſpaſſe

Treſpaſſe was brought for hunting and breaking of hedges, and the caſe was, that a man ſtarted a Fox in his own land, and his Hounds purſued him into another mans Lands, and it was holden that he may hunt and purſue him into any mans land, becauſe a Fox is a noyſom creature to the Common-wealth.

Bracton ſaith, that when a man is outlawed he hath Caput lupinum, and he may be hunted through all the County: And he agreed the caſe of 8 E. 4. If a Tree grow in a hedge, and the Fruit fall into another mans land, the Owner may fetch it in the other mans land, and he alſo agreed the caſe of 22 E. 4 8. of the Plow, and ſo concluded that the treſpaſſe doth not lye.

Jones Juſtice, that the treſpaſſe doth not lye, vide Co. lib. 8. 67. Crogates caſe, and lib. 4. Terringhams caſe, and he cannot recall his Dog in an inſtant: And the ſame day Judgment was given for the Defendant, Quod quærens nil capiat per billam.

The ſame Term in the ſame Court.

Marſh *verſus* Newman.

IN a Replevin the Defendant pleaded that was ſeiſed In jure Collegii, and doth not ſay, that he was in Dominico ſuo ut de fœdo, and the Plaintiff demurred upon the Avowry. And Andrews argued for the Plaintiff.

1. The Defendant ought to have alleadged certainly that they were ſeiſed in Fee; for Littleton ſaith, that in Counts and pleadings a man ought to ſhew how he is ſeiſed, 8 E. 3. 55. 13 Eliz. Dyer. 299. Pl. 31. An Inquiſition was found upon an extent of a Statute-merchant, and doth not ſhew how the Conuſor was ſeiſed, but only that he was ſeiſed, and the Inquiſition holden void. But it may be objected, that if Land be given to a Dean and Chapiter that they have fee, 11 H. 7. 12. I confeſſe it: But the conſtant uſe of pleading hath alwais been in caſe of a Biſhop, Colledge, &c. to ſay, that they were ſeiſed in Fee, as appears in Hill and Granges caſe, and Co. lib. 6. the Dean and Chapiter of Worceſters caſe, and Co. lib. 11. 66. Magdalen Colledge caſe; and it appeareth by 20 H. 7. in the Abbey of S. Auſtins caſe, that an Abbey may have a Leaſe Præ auter vie, and ſo perhaps here the Dean had a Leaſe but Præ auter vie, and therfore ought to have alledged that he was ſeiſed in Fee, if the truth were ſo. And he moved other exceptions, as 1. That the Defendant intitled himſelf to a Leaſe as Executor, and doth not plead Literas teſtamentarias.

2. That the Defendant entitles himſelf to a Rent, part of which was due in the time of the Teſtator, and part in his own time, and doth not ſhew when the Teſtator died, and therfore the Avowry not good.

Jermy for the Defendant that the Avowry is good, and it cannot be otherwiſe intended but that they are ſeiſed in Fee, 11 H. 7. Lands given to a Major and Comminalty is Fee-ſimple, but otherwiſe of an Abbot and Parſon, Plow. 103. and Dyer 103. A Seiſin in Fee is implied by Seiſin In jure Collegii; and becauſe it hath been objected that he may be ſeiſed Præ auter vie, this is but a forraign intendment, for a Fee is alwaies intended Seiſin in Fee-ſimple.

For the ſecond objection, becauſe Non profert literas teſtament, true it is if he entitle himſelf meerly as Executor, he ought to bring in Literas teſtamentar. but our caſe is not ſo, for here we are Defendants, and we endeavour only

only to excuſe a Tort, 36 H.6.36. Where a man is Plaintiff he ought to ſhew Literas teſtamentar. that ſo the Court may ſee that he hath cauſe of action, but here it is only by way of excuſe.

For the third, that the death of the Teſtator doth not appear is not materiall, for if any part be due to him, it is due as Executor.

Doderidge, they ought to have pleaded that they were ſeiſed in Fee; true it is, that Land given to a Mayor and Comminalty is Fee-ſimple, and the reaſon is becauſe they are perpetuall, and if the Eſtate be not limitted they ſhall take according to their continuance, 11 H.4.11 H.7. and 27 H.8 Dockrayes caſe, they may be ſeiſed Præ terme dauter vie, but if they had pleaded that they were ſeiſed to them and their Succeſſors, this pleading is good, Prima facie, 17 E.3.1.

Crew chief Juſtice, all the authorities are that they were ſeiſed in Fee, In jure Collegii, and it is good to admit a new way of pleading.

Jones Juſtice, Tenant Præ auter vie makes a Leaſe for years, and ceſtui que uſe, dies, he cannot have an action of Debt againſt Leſſee for years, for he is now Tenant at ſufferance. But for the firſt point, it ſeems to him that the pleading is not good, for although in point of Creation, they take a Fee by a Gift to Dean and Chapiter, yet in pleading they ought to alledge their Eſtate ſpecially, for they may have an Eſtate Præ auter vie: And this is in an Advowry which ſhall be taken ſtrickly. And by Crew chief Juſtice, the Defendant here ought to ſhew Literas teſtamentar. for he is an eſpeciall Actor in the Avowry. And by Doderidge, Longiſſimum vitæ tempus eſt 100. years, Co.lib.10 50. Lampets caſe, and therefore in pleading, if the Defendant had ſaid, that a Dean and Chapiter were ſeiſed, and made a Leaſe for 200. years, this implies a Seiſin in Fee, becauſe a man cannot have ſo long a life, but here the Leaſe is but for 89. years, and it is common to let for 89. years, if A. ſhall ſo long live, yet this is but a ſlip, and the Title is apparant.

The ſame Term in the ſame Court.

Hodges *verſus* Moore.

IN Debt for marriage money, the caſe was this: A man was bound to Hodges to pay him a 1000 l. after that he had married his Daughter, and afterwards he married her, and brought Debt upon this Obligation, and it was not averred that he had given notice to him of the marriage, but demanded the money: And this was moved by Noy in Arreſt of Judgment (but quære if requeſt afterwards doth not imply notice.)

Where notice is requiſite before action, and where not.

And Doderidge Juſtice put this caſe, A man is bound to pay a 100 l. two moneths after A. return from Rome, he ought to give notice of his return before that he can have an action upon this Obligation, for he may land at Newcaſtle, or Plymoth, where by common intendment the Obligor cannot know whether he be returned, or not; and this was agreed by the chief Juſtice and Jones.

And Serjeant Davies argued for the Plaintiff, that there need not preciſe notice to be given, and he cited 1 H. 7. 18 E. 4. and Co. lib. 8. Where the Obligor ſhall take notice at his perill, and ſo here becauſe he takes upon him for to pay it: And it was ſaid, that one Blackamores caſe was adjudged in the point, and he conceived alſo that this requeſt afterwards is a ſufficient notice. But Noy for the Defendant ſaid, that he ought to give notice, or otherwiſe this miſchief would enſue, that if he had not married her, and yet had demanded

demanded the money he ought to pay it: and he ſaid, that where an act is to be done by a ſtranger, the Plaintiff or Defendant ought to take notice therof at his perill, as the caſe E. 4. where a man was bound to ſtand to the Award of J. C. he ought to take notice of the Award at his perill: but where it lies properly in the Conuſance and notice of the Plaintiff, there he ought to give notice therof to the Defendant, Co. lib. 5. Mallories caſe: If a Reverſion be bargained and ſold to J. S. the Bargainee ſhall have the Rent without Attornment; but if a penalty be to be forfeited, he ought to give notice to the particular Tenant of the Grant, or otherwiſe he ſhall not take advantage therof: and he cited a caſe which was in 17 Eliz. Stephen Gurneys caſe; Leſſee for years, the Reverſion is granted over for years by way of future Intereſt, to begin upon the death, forfeiture, or determination of the firſt Leaſe; provided that if the Rent upon the ſecond Leaſe be arrear, that the Leſſor may enter; the firſt Leſſee ſurrender, a Rent-day incur, the ſecond Leſſee doth not pay the Rent, the Leſſor ſhall not enter for a Forfeiture, becauſe the firſt Leaſe determined by an act which lies properly in the Conuſance of the Leſſor, and becauſe he was to take advantage by it, he ought to have given notice therof to the Leſſee, and here he might have well given notice to the Defendant, for it lies properly in the Conuſance of the Plaintiff.

The ſecond Objection was, that here was an implied notice, becauſe the Marriage was at the inſtance of the Defendant, which implies a notice.

Under favour, this is no notice, for this is before the marriage, but if no notice be given after the marriage, then there is no notice.

But by Serjeant Davies, there is a ſufficient implication, and there is no need of notice in our caſe; and ſee Co. lib. 8. Francis his caſe, where they ought to take notice at their perill, and a marriage is an Eccleſiaſticall Judgment of which he ought to take notice, and he was interrupted, for all the Juſtices went to the Parliament. And divers Preſidents were cited, that there need no notice to be given in this caſe: And it was agreed that Judgment ſhould be given for the Plaintiff: And in Trinity Term next following, Judgment was accordingly given for the Plaintiff.

The ſame Term in the ſame Court.

Sir George Reynolls *Caſe*.

What Bonds a Sheriff or Marſhall may take.

SIr George Reynoll Marſhall of the Marſhalſey of the Kings Bench, brought Debt upon a Bond, the Condition wherof was, that the Defendant ſhall be a true Priſoner, and it was doubted whether the Bond were within the Statute of 23 H. 6 cap. 10.

Doderidge, It is not to be underſtood by this Statute that a Sheriff, Gaoler, or Marſhall ſhall take no Bond, for if the Marſhall hath a man in execution, and fear that he will eſcape, and he takes Bond of him, this Bond is good.

Jones, The intent of the Statute, that the Sheriff or Marſhall ſhall not ſuffer Priſoners to go at large, for that is within the Statute.

Within the Rules of B. what it is.

And it was ruled in the Kings Bench, that the Marſhalſey ſhould be enlarged, and this ſhall be called within the Rule, and if the Marſhall take a Bond to tarry there it is good, but if he ſuffer him to go at large, it is not good.

The ſame Term in the ſame Court, Sury *verſus* Albon Pigot, and three other Defendants, *Intr. Hill.* 1. *Car. Rot.* 124.

IN an action upon the caſe for ſtopping his Water-courſe, the Plaintiff declares that 14. Octob. 22. Jac. he was poſſeſſed of the Rectory of M. in Barkſhire, of which a Curtilage was parcell, and that in this Curtilage is and hath been time out of mind a watering place, for the watering of the Cattell of the Plaintiff and others, and for other neceſſary uſes, and that a certain Watercourſe had time out of mind flowed from Mildford ſtream to this Curtilage, and that this water filled the ſaid Pond; and further that the Defendant well knowing this, and intending to dam up the ſaid Watering-courſe, built a ſtone Wall thereupon whereby the Water-courſe was ſtopt up, to the Plaintiffs damage of 20 l. and this was laid with a Continuando. The Defendant plead that 3 H. 8. the ſaid H. 8. was ſeiſed of the Mannor of &c. and of the ſaid Rectory in his Demeſne as of Fee, and of a certain peece of Land called the Hopyard lying between the ſaid watering-place and the ſaid ſtream, and by his Letters Patents granted this to Wiliam Box and his Heirs, by virtue whereof he was ſeiſed: Francis Searles entred upon him and was ſeiſed, and enfeoffed Pigot, 20 Jac. by virtue whereof he was ſeiſed, &c. and the three others juſtifie as Servants to Pigot, that they the ſaid day and year filled up the ſaid Water-courſe, as it was lawfull for them to do; and that this is the ſame Treſpaſſe, &c. The Plaintiff demurs. And the queſtion is, whether the unity of poſſeſſion of all in H. 8. hath extinguiſhed the Water-courſe.

Whether unity of poſſeſſion in ſeverall lands, ſhall deſtroy a Water courſe.

And by Dorrell for the Plaintiff, if it were of a Common, it is cleer, that it is deſtroyed, becauſe Common ought to be in another mans Land, but not in our caſe, for if one preſcribe to have Warren, if he purchaſe the Land yet he ſhall have Warren, 11 H. 7. 25. there are two houſes, and the one preſcribe that the other ſhall mend the Gutter, and afterwards they come to the hands of one man, and then he alien one of them, this unity ſhall deſtroy the mending of the Gutter.

Berd for the Defendant, that the unity hath deſtroyed the cuſtom, 21 E. 3. 2. A way is but an eaſement, yet by the purchaſe of the Land the way is extinguiſhed, and alſo the watering-courſe is not only an eaſement but a profit, or Prender; and he cited Dyer 295. in caſe of an Incloſure, that the Incloſure is extinguiſhed, but there is made a quære, and he cited 38 Eliz. in C. B. an opinion, that by purchaſe of a Cloſe the Incloſure is extinguiſhed; a fortiori here becauſe it is a profit: And for the caſe of 11 H. 7. it is by the cuſtom of London, but there is no cuſtom in our caſe, and the caſe of a Warren is not like to our caſe, becauſe a man may have Warren in his own Soil; And in Michaelmas Term next the caſe was argued again by Barkeſdale for the Plaintiff, that the unity of poſſeſſion in H. 8. had not extinguiſhed the Water-courſe, and that the Terminus ad quem, and the Medium alſo being in one, had not diſtinguiſhed nor deſtroyed it. And 1 Col lib. 4. 26. Benedicta eſt expoſitio quando res redimitur a diſtructione; The Law will not deſtroy things, but the Law will ſomtimes ſuffer a fiction (which is nothing in rerum natura) ut res magis valeat. I confeſſe that profit apprender as Common, or Rent is extinguiſhed by unity of poſſeſſion, for Common it appeareth in 4 E. 3. and Co. lib. 4. Terringhams caſe: And for Rent it appeareth in 4 H. 4. 7. and in 21 E. 3. 2. it appeareth that a way is extinguiſhed by unity of poſſeſſion, 3 H. 6. 31. Brook Nuſance 11. for it is repugnant for a man to have a way upon his own Land: But I conceive that our caſe differs from the caſe of a way, and that for this reaſon; where the thing hath a being and exiſtence,

iſſence, notwithſtanding the unity there it is not deſtroyed by the unity, but the Water-courſe hath a being notwithſtanding the unity, ergo, &c. I will prove the major propoſition by theſe caſes, 35 H.6.55,56. Where a Warren is not extinct by a Feoffment of the Land, for I may hawk and hunt in my own land as in another mans, ſo the Warren hath exiſtence, notwithſtanding the unity, Dyer 326. Where the Queen was ſeiſed of Whaddon Chaſe, and the Lord Gray was Lieutenant there in Fee, and he and his Anceſtors and their Keepers had by preſcription uſed to hunt wandring Deer in the Demeſns of the Mannor of S. adjoyning as in Purlieues: the Mannor of S. comes into the Queens hands, who grants this to Forteſcue in Fee, with free Warren within the Demeſns, &c. it was holden that the unity doth not extinguiſh the Purlieu, Dyer 295. Two Cloſes adjoyn, the one by preſcription is bound to a Fence, the Owner of one purchaſe the other, and ſuffer the Hedges to decay, and dies, leaving two Daughters his Heirs, who make partition: Quære whether the preſcription for the Incloſure be revived; true it is that it is made a quære, but he ſaith, ſee the like caſe, 11 H. 7.27. of a Gutter which proves our caſe, as I will ſhew afterwards.

For the Minor propoſition that the watering hath being, notwithſtanding the ſaid unity, I will prove it by 12 H.7. 4. A Precipe quod reddat of Land Aqua Co-opert, Mich.6. Jac. Challenor and Moores caſe. An Ejectione firmæ, was brought of a Watering-courſe, and there reſolved that it does not lye of it, becauſe it is not firma, ſed currit, but of Terra aqua co-operta, it doth lye. Alſo I will take ſome exceptions to the Bar, there is no Title in the Bar for the Defendant Pigot, and ſo we being in poſſeſſion, albeit in truth we have no Title, yet he who hath no Title cannot ouſt us, neither can ſtop the ſaid Water-courſe, and it is only ſhewn in the Bar that Searles entred and enfeoffed Pigot, but for any thing as yet appears the true Owner continued in poſſeſſion, 21 Jac.C.B. Cook againſt Cook in a Writ of Dower, the Defendant pleads an Entry after the Darrein continuance, and doth not plead that he ouſted him, and upon this the Plaintiff Demurs, and there adjudged that it is no plea in Bar, becauſe he doth not ſay, that the Defendant entred and ouſted the Tenant. 2. Exception, the action is brought againſt four, Scil. Pigot, Cole, Branch, and Elyman; and Pigot hath conveyed a Title from Searles, the three other Defendants juſtifie, but Pigot doth not ſay any thing but that Searles enfeoffed him, 7 H. 6. an action of Waſt is brought againſt many, one anſwers, and the other not, this is a diſcontinuance: And for the principall matter, I will conclude with 11 H.7.25. Broo. Extinguiſhment 60. Two have Tenements adjoyning, and the one hath a Gutter in the others Land, and afterwards one purchaſe both, and then he alien one to one, and another to another, the Gutter is revived notwithſtanding the unity, becauſe it is very neceſſary, and ſo he prayed Judgment for the Plaintiff. Bear for the Defendant: I in a manner agree all the caſes which have been put on the other ſide; and I conceive that the Water-courſe is not Stagnum but Servitium, which is due from the one land to the other: It is but a liberty, and therefore I agree Challenors caſe, which is but a liberty that an Ejectione firmæ doth not lye of it, but Ejectione firmæ lies De ſtagno.

For the firſt exception I anſwer and confeſſe, that to alledge an Entry after the Darrain continuance, without alledging an Ouſter of the Tenant, cannot abate the Writ, for the Defendant may enter to another intent as appeareth in the Commentaries, and with the aſſent of the Tenant; But here it was alledged that a Feoffment was made and a Livery which implies another.

For the matter in Law, I conceive that the Water-courſe is extinguiſhed, and it may be compared to 21 E.3. 2. The caſe of a way which is extinguiſhed by unity of poſſeſſion, Hill.36. Eliz. Rot. 1332. Hemdon and Crouches caſe

caſe. Two were ſeiſed of two ſeverall acres of Land, of which the one ought to incloſe againſt the other, one purchaſe them both, and lets them to ſeverall men, and there the opinion was, and adjudged accordingly, that the Incloſure is not revived, but remains extinguiſhed, 39 Eliz. Harringtons caſe, the ſame thing reſolved, and albeit in Dyer 295. is a quære, yet the better opinion hath been taken according to theſe reſolutions. H. 4. Jac. Jordan and Ayliffes Caſe, when one had a way from one acre to another, and afterwards he purchaſed the acre upon which he had the way, and afterwards ſold it, and in that Caſe the opinion of 3. Juſtices was that the way was extinguiſhed; alſo 11 H.4.50. and 11 H.7.25. prove this caſe, for the ſaid caſe is compared to the cuſtome of Gavelkind and Burrough Engliſh, and there the quære is made whether by the cuſtome it be revived, and if it be a cuſtome which runs with the Land, the unity of poſſeſſion doth not extinguiſh it, Co. lib.4.Terringhams caſe, and 24 E.3.2. common appendant is deſtroyed by unity of poſſeſſion, and yet it is a thing of common right, but a Water-courſe being a thing againſt common right, a fortiori it ſhall be extinguiſhed. Now I will take ſome exceptions to the Declaration.

1. Becauſe he hath laid a preſcription for a Water-courſe, as to ſay, that it was belonging to a Rectory, to which, &c. and this is a good exception, as appears by 6 E 6 Dyer 70. Iſhoms caſe, where exception was taken, that before his preſcription he doth not ſay, that it was Antiquum parcum, which exception (as it is there ſaid) was the principall cauſe that Judgment was given againſt him, and alſo as the caſe is here, it ought to be a Rectory impropriate, and this cannot be before the time of H.8. which is within time of memory, for before the ſaid time no lay perſon could have a Rectory impropriate, and therfore I pray Judgment for the Defendant.

Barkſedale ſaid, that the preſcription is well laid, and that he would prove by 39 H 6.32. and 33 H.6. 26. and per curiam the preſcription is good enough, and albeit it is not ſaid, that it is Antiquæ Rectoria, yet it is well enough, Mich. 1 Car. at Reading Term in Brock and Harris caſe, he doth not ſay, that it was Antiquum Meſſuage, and yet reſolved good.

Doderidge, the caſe of 6 E.6. differs in this point from this caſe, for a Rectory ſhall alwaies be intended ancient, and ſo is not a Park, for this may be newly created: and he put this caſe; ſuppoſe I have a Hill, and I have a Water-courſe to this in my own land, and I ſell the Land, I cannot ſtop the Water-courſe.

Crew chief Juſtice ſeemed of opinion that the preſcription is gone, and that the better opinion in Dyer 13 Eliz. hath alwaies been that the Incloſure is gone by unity of poſſeſſion, but yet the Water-courſe is matter of neceſſity.

Doderidge and Whitlock, the way is matter of election, but the courſe of water is naturall.

Jones Juſtice, There is great difference between a way and a water-courſe as to this purpoſe, for admit that this water-courſe, after that it had been in the Curtilage of the Plaintiff, goes further to the Curtilage of another, ſhall not that other have the benefit of this water-courſe notwithſtanding the unity of poſſeſſion? I think clearly that he ſhall.

Doderidge, my opinion is, that the water-courſe is not extinguiſhed by the unity of poſſeſſion: But ſome conceived that he had declared his opinion in terror to the Defendant: And afterwards the ſame Term Barkſedale for the Plaintiff ſaid, that he had agreed the caſe before, and therfore would now only indeavour to anſwer ſome exceptions which had been taken to the Declaration.

1. Exception hath been that no preſcription or cuſtom is made for this water-courſe, but only that Currere ſolebat & conſuevit. But I conceive that

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the Declaration is good notwithſtanding this, becauſe the Plaintiff here doth not claim an intereſt in the Water-courſe, but in the Land in which, &c. and therfore it is good, and this appeareth by 12 E.4.9. the Prior of Lantonies caſe in a preſcription in a Parket obert generally, and the reaſon there was, becauſe he was a ſtranger, as in our caſe he is, and this pleading appeareth alſo to be good by Cooks Book of Entries, 18. Smiths caſe, which was entred 9 Jac. Rot. 366. in this Court. 2. Exception was, becauſe it is not ſaid, that it was Antiqua Rectoria. 3. Exception, becauſe it doth not appear that he was a ſpiritual man to whom the Demiſe of the Rectory was made. 4. Becauſe it is not ſaid, that the Water-courſe Ad predict. Rectoriam pertinet. 5. Becauſe the Water-courſe is alledged to be for his cuſtomary Tenants of the ſaid Rectory, and this is not good, as appeareth by 21 Eliz. Dyer, 363. Preſcription, Pro quolibet cuſtomar. Tenente, is not good, but I conceive that this caſe is not our caſe, for here is Cuſtomarius tenens Rectoriæ, and there it is agreed that Quilibet cuſtomarius tenens Maner. had been good: And the plea in Bar hath ſalved theſe objections, and therfore he prayed judgment for the Plaintiff.

Jeremy for the Defendant; And firſt for the matter in Law, it ſeemed to him that by the unity of poſſeſſion the Water-courſe is extinguiſhed, and the Water-courſe may well be compared to the caſe of the way, for as a way is a paſſage for men over the land, ſo water hath paſſage upon the land, and a way is extinguiſhed by unity, as appeareth by 21 E. 3. 2. 11 H.4, 5. 21 Aſſ. and Davies Reports 5. and in 4 Jac. Jordan, and caſe it was the better opinion that a way was extinguiſhed by unity of poſſeſſion; true it is, that there Popham chief Juſtice put the difference, where the way is of neceſſity and where not, for where the way is of neceſſity there it ſhall not be extinguiſhed: This caſe hath been compared to the caſe of a Warren in 35 H.6. but I conceive that the caſes are not a like, becauſe a Warren is a meer liberty, 8 H.7.5. A man may have a Warren in his own Land, and Co. lib.7. Buts caſe by a Feoffment of Land, a Warren doth not paſſe, but this Water-courſe hath its originall out of the Land, and this caſe cannot be compared to an ancient Water-courſe running to a Mill, for notwithſtanding the unity it ſhall paſſe with the Mill, for otherwiſe it ſhall not be Molendinum aquatinum, ſo that the water there is parcell of the thing, and ſo of neceſſity ought to paſſe with the thing, but here it doth not appear that it is a Water-courſe of neceſſity, and for any thing that appeareth, it may be filled with another Water-courſe: Alſo I conceive that the Declaration is not good. 1. Becauſe neither preſcription nor cuſtom is laid for the Watercourſe, and it appeareth in Co. Book of Entries, Holcome and Evans caſe, and the old Book of Entries, 616, 617. Mich. 1. Car. Rot. 107. Turner and Dennies caſe in this Court, in treſpaſſe for breaking his Cloſe, &c. the Defendant juſtified for a way, &c. and that he was poſſeſſed for years, and for him and his Occupiers had a way over the Land, the Plaintiff demurred, and reſolved that the preſcription is not good. 2. The Declaration is inſufficient being an action upno the caſe for the ſtopping of a Water-courſe, and it is not Vi & armis, nor Contra pacem, Co. lib. 9. 50. the Earl of Shrewsburies caſe, when there are two cauſes of an action upon the caſe; the one Cauſa cauſans, the other Cauſa cauſata, cauſa cauſans may be alledged Vi & armis, for this is not the immediate cauſe of the action, but Cauſa cauſata F. N. B. 86. H. and 92. E. in the end of the Writ of action upon the caſe ſhall be Contra pacem. 3. Alſo he hath preſcribed for the Tenants of the Rectory, which is not poſſible, for no Lay-man could be Tenant of a Rectory, or of Tithes before the Statute of H.8. and therfore I pray Judgment for the Defendant.

Whitlock chief Juſtice conceived that the declaration was good, & the bar is naught, both for the form & matter: the queſtion here is of Aqua profluens, and

I conceive that there needs no preſcription or cuſtome in this caſe, for water hath its naturall courſe, and as is obſerved by Brudnell in 12 H.8. Natura ſua deſcendit, it may be called Uſu captio, or Uſage, and he conceived that the action upon the caſe very well lies in this caſe, like to the caſe where a man hath a houſe and windows in it, and another erect a new houſe and ſtop the light, then I may have an action upon the caſe; but true it is, that I ſhall not only count for the loſſe of the aire, but alſo I ought to preſcribe that time out of mind light have entred by theſe windows, &c. ſee 7 E.3. If there be a School-maſter in a Town, and another erect a new School in the ſame Town, an action upon the caſe doth not lye againſt him, becauſe Schools are for the publike benefit, and every private man may have a School in his houſe. And for the exception, that a Lay man cannot be poſſeſſed of a Rectory, I conceive that the Declaration is good notwithſtanding, for a Lay-man may have a Rectory by Demiſe.

And for the Plea in bar, it is not good for the form, becauſe that Searles entred and enfeoffed Pigot, and it is not ſaid, that he entred, and Expulit, and if a man enter and make a Feoffment, the owner being upon the Land the Feoffment is void, and therefore an actuall Duſter ought to be ſhown: And for the matter in Law, he conceived that the Bar was not good, for by the unity of poſſeſſion the water-courſe is not extinguiſhed, and yet I agree the caſes of a way and common upon the differences of Rights which are put in Bracton, lib 4. 221. Theſe are called Servitutes, as jus eundi, fodendi, hauriendi, &c. ſunt ſervitutes quas prædia ex quibus exunt aliis prædiis debent, and are called Servitutes prædiales, and this began by private right, to wit, by grant or preſcription.

A way or common ſhall be extinguiſhed, becauſe they are part of the profits of the Land, and the ſame Law is of Fiſhings alſo, but in our caſe the water-courſe doth not begin by the conſent of parties, nor by preſcription, but Ex jure naturæ, and therefore ſhall not be extinguiſhed by unity: A Warren is not extinguiſhed by unity, becauſe a man may have a Warren in his own Land, and in the caſe of 11 H.7. the Gutter was not extinguiſhed only by the unity of poſſeſſion, but there alſo appeareth in the caſe that the Pipes were deſtroyed, wherby it could not be revived, and although the Book of 13 Eliz. Dyer 295. Two Cloſes adjoyn together, the one being by preſcription bound to a Fence, the owner of the one purchaſe, the other dies, having iſſue two Daughters, who make partition, it is a quære whether the incloſure be revived, yet I conceive clearly, that by unity of the poſſeſſion the Incloſure is deſtroyed, for fencing is not naturall, but comes by induſtry of men, and therefore by the unity it ſhall be gone, and ſo briefly with this diverſity he concluded that where the thing hath its being by preſcription, unity will extinguiſh it; but where the thing hath its being Ex jure naturæ, it ſhall not be extinguiſhed, and therefore the Plaintiff ought to have Judgment.

Jones Juſtice agreed, that the Declaration is good, and that the Bar alſo is good in manner, but for the matter in Law it is not good.

As to the firſt exception to the Declaration, I conceive it is good, albeit there wants a preſcription, and this is the ordinary of pleading, as appears in Co. lib. 4 Luttrels caſe, and in all the preſidents before cited.

2. For the exception Vi & armis, he conceived this difference, where the act is a Treſpaſſe and a Nuſance, there it may be laid to be Vi & armis, but if it be a Nuſance only and not a Treſpaſſe, it is otherwiſe: as if I have a way over another mans Land, if a ſtranger dig in the Land ſo as I cannot have the way, now becauſe it is a Treſpaſſe to the Owner of the Soil, in my action upon the caſe againſt a ſtranger, I may have Vi & armis, but if the owner ſtop the way, there Vi & armis ſhall not be in my action upon the caſe.

For the third exception, becauſe he doth not ſay, Ad Rectoriam ſpectandum, but

but I conceive that it ſhall be intended ad Rectoriam impropriat, and ſo it appeareth.

4. Where it is ſaid, Watering-courſe for his Tenants, I conceive it is good enough, being in an action upon the caſe where damages only are to be recovered: That the Bar alſo is good in form, for although the Tenant here be a Diſſeiſor, yet it is a good Bar, for it matters not whether he hath a Title or no, if the Water-courſe be extind by the unity, for the matter in Law, he conceived that the unity of poſſeſſion had not extinguiſhed the Water-courſe. A man hath things out of another mans Land, either by grant as a Seigniory, Rent, Common, &c. and theſe are diſtinguiſhed by unity, &c. and the reaſon is, becauſe one who hath intereſt as Owner of the Land, cannot have a particular intereſt in the ſame Land alſo. Or by preſcription, and thoſe things are extinguiſhed by unity of poſſeſſion alſo, and not only for the firſt reaſon becauſe he is Owner of the Land, and ſo cannot have a particular intereſt in the ſame Land alſo, but alſo becauſe that by the unity the preſcription fail? And for the caſe in Dyer, 13 Eliz. I conceive that by the unity the incloſure is gone, and ſo it was reſolved in 37 Eliz. for every one is not bound to incloſe: For the caſe of the way, I will ſuſpend my opinion concerning it, becauſe Clark and Lambs caſe is now depending touching it in the ſame point.

But now for our caſe, it differs from the other caſes, for the preſcription here is in another manner then is made for Common, for it ſhall be pleaded either as appendant, or appurtenant, but Currere ſolebat is only in this pleading, for here no intereſt is claimed, but in the other caſes an intereſt is claimed: In this caſe the Land remains as it was before, and therfore the unity will not extinguiſh it; and if ſuch a unity by conſtruction of Law ſhould extinguiſh Water-courſes, it would be too dangerous: for ſuppoſe that a man hath a Water-courſe from Thames to his houſe in Lambeth, if he purchaſe a parcell of Land in Hendley; now becauſe that the Thames come by the ſame Land, his Water-courſe ſhall be extinguiſhed. Alſo ſuppoſe that the Water-courſe after it hath been in the Curtilage of the Plaintiff, goes into another Curtilage, is it reaſon that by this unity the ſecond man ſhall loſe his Water-courſe? without doubt it is unreaſonable. And the caſe of 11 H. 7. of the Gutter, warrants this opinion, and therfore the Plaintiff ought to have Judgment.

Doderidge Juſtice, I conceive no great difficulty in the caſe; for the exceptions to the Declarations they are not materiall.

1. That there wants Preſcription or Cuſtom. I conceive that it is good enough, for here are the words of Currere ſolebat & conſuevit, and Conſuevit is a good word for a Cuſtom.

2. That a Lay-man cannot have a Parſonage; true it is, that a Lay-man cannot be a Parſon, but he may have a Parſonage, for he may be Leſſee of it, which appeareth many times in our Books.

3. That it is not alledged to be Vi & armis, this is the moſt colourable exception, and the caſe and rule cited out of Co. lib. 9. the Earl of Shrewsburies caſe is good Law, but it is impoſſible to plead Vi & armis in this caſe, for the unity was in H. 8. and the wrong is ſuppoſed after the ſeverance, and it is ſuppoſed to be done by the Owner of the Land, and a man cannot do a thing upon his own Land Vi & armis.

4. Becauſe it is not alledged to be an ancient Rectory: I conceive it need not, becauſe the Law preſumes all Rectories to be ancient, the Patronages wherof are gained Ratione fundi, fundationis, vel dotationis.

5. Becauſe he doth not ſay, that Pertinet ad Rectoriam: But he hath ſaid a thing which amounts to as much; for it is ſaid, that in the Rectory was a certain Curtilage in which there is a Watering-pond, and the Curtilage

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is part of the houſe, and therfore he need not ſay, that it belongs to the houſe. For the Bar I conceive that it is good for the Mannor: A man makes a Feoffment of Land, the Owner of the Land being preſent at the ſame time, nothing works by the Livery for the reaſon before given by Jones. For the matter of Law he conceived that the unity of poſſeſſion doth not extinguiſh the Water-courſe, and that for two reaſons.

1. For the neceſſity of the thing.

2. From the nature of the thing being a Water-courſe, which is a thing running.

1 For the neceſſity, and this is the reaſon that common appendant by the unity of poſſeſſion ſhall not be extinguiſhed, for it is appendant to ancient Land-hide, and gain arable Land, which is neceſſary for the preſervation of the Common-wealth; and as in this caſe there is a neceſſity of bread, ſo in our caſe there is a neceſſity of water: And for the caſe of a way Diſtinguendum eſt, for if it be a way which is only for eaſement it is extinguiſhed by unity of poſſeſſion, but if it be a way of neceſſity, as a way to Market or Church, there it is not extinguiſhed by unity of poſſeſſion, and accordingly was the opinion of Popham chief Juſtice, which I take for good Law, and the caſe of 11 H.7.25. is a notable caſe, and there a reaſon is given why a Gutter is not extinguiſhed by unity of poſſeſſion, becauſe it is matter of neceſſity.

2. From the nature of water, which naturally deſcends, it is alwais current, Et aut invenit aut facit viam, and ſhall ſuch a thing be extinguiſhed which hath its being from the Creation. Co.lib.4. Luttrels caſe, a Mill is a neceſſary thing, and if I purchaſe the Land upon which the ſtreams goes which runs to this Mill, and afterwards I alien the Mill, the Water-courſe remains. So if a man hath a Dye-houſe, and there is a water running to it, and afterwards he purchaſe the Land upon which the water is current and ſell it, yet he ſhall have the Water-courſe, Dyer: Dame Browns caſe, and the principall caſe in Luttrels caſe, a Fulling-mill made a Water-mill, this ſhall not alter the nature of the Mill, but yet it remains a Mill, ſo the water hath its courſe notwithſtanding the unity, and he concluded for the Plaintiff.

Crew chief Juſtice, I agree that the Declaration is good, and alſo that the Bar is good for the manner, but for the matter in Law, I conceive that it is not good. In our Law every caſe hath its ſtand or fall from a particular reaſon or circumſtance: For a Warren, and Mithes they are not extinguiſhed by unity, becauſe they are things collaterall to the Land: And for the caſe of 13 Eliz. in Dyer, of an Incloſure; I conceive that by the unity the Incloſure is deſtroyed, for the Preſcription was interrupted, and in Day and Drakes caſe, 3 Jac. in this Court it was adjudged that in the ſame caſe the Preſcription was gone; It may be reſembled to the caſe of Homage Anceſtrell 57 E.3. Fitzherbert Nuſans: And for our caſe it is not like to the caſes of Common, or a Way, becauſe the Water-courſe is a thing naturall and therfore by unity it ſhal not be diſcharged; alſo there is a linement out of which every man ſhall have a benefit, and therfore he concluded that Judgment ſhould be given for the Plaintiff; And Judgment was commanded to be entred for the Plaintiff.

The

The ſame Term in the ſame Court.

Welden *verſus* Veſey.

An action of Debt was brought by Welden Sheriff of the City of Coventry againſt Veſey, upon the Statute of 29 Eliz. cap. 4. and declares, that it is provided by this Statute that no Sheriff or Miniſter, &c. ſhall take for an execution, if the ſumm doth not exceed 100 l. but 12 d. for every 20 s. and being above the ſumm of 100 l. 6 d. for every 20 s. and ſhews that whereas the ſaid Veſey had judgment againſt one in an action of Debt, that the Plaintiff by virtue of a Capias directed to him, took the body of the ſaid perſon condemned, and that it was delivered to the Plaintiff, and that he for levying of the money had brought this action.

The Defendant by way of Bar ſaith, that it is provided by this act that it ſhall not extend to Executions in Towns Corporate, and that this was within Coventry, and ſo demurred upon the Declaration.

And Whitwick argued for the Plaintiff; two things are conſiderable in this caſe.

1. Whether where the ſumm exceeds 100 l. the Sheriff ſhall have 12 d. for every 20 s. of the 100 l. and 6 d. for that which is over, or 6 d. only for every 20 s. for all the ſumm.

2. Whether this Statute extend to Judgments in Towns Corporate. For the firſt, the letter of the Statute is clear that he ſhall have 12 d. for the firſt 100 l. and 6 d. for the reſidue, for the Statute is, that if it be above 100 l. that he ſhall have but 6 d. therefore if it be under a 100 l. he ſhall have 12 d. for every 20 s. And the meaning of the Statute is plain alſo, for otherwiſe the Sheriff ſhall have a leſſer Fee where it is above a 100 l. (as where it is a 199 l.) then he ſhall have for 100 l. but this was not the intent of the Statute, but the greater the Execution, the greater the Fee: It was adjudged in one Gores caſe, 10 Jac. that an action of Debt lies upon this Law, Paſch. 14 Jac. Rot. 351. Brole and Tumblerſon Sheriffs of the City of London, brought Debt againſt Nathanael Micheil for execution of 400 l. for 12 l. 10 s. ſcil. 5 l. for the firſt 100 l. and 6 d. for every 20 s. after: But I confeſſe that the principall queſtion there was, whether an action of Debt lies for the money, and it was reſolved that it did, and Judgment was given for the Plaintiff.

Whether a Sheriff, or, &c. ſhall have 12 d. in the pound for the firſt 100 l. and 6 d. for the reſt upon an Execution.

2. To the Proviſo, that this doth not extend to Fees in a Town Corporate, whether this extend to executions which go out of Judgments in this Court, or in the Common Pleas into Towns Corporate. The Statute ſhews that before that time the Sheriff had taken great Fees, which the Parliament conſidering, reſtrained them to a certainty; The words of the Proviſo are generall: Provided that this Act ſhall not extend to any Fees to be taken for any Execution within any City or Town Corporate, and although the words be generall, yet the expoſition ſhall be according to reaſon, as it is ſaid in Fulmerſton and Stewards caſe in Plow. Expoſition, ſhal be made againſt the words, if the words be againſt reaſon, 5 H. 7. 7 38 H. 3. Broo. Livery 6. The King ſhall have primer Seiſen of all Lands of his Tenant which he holds of him in Capite, but if one holds of the King in Capite, in Socage, he ſhall pay no primer Seiſen to the King, and this Statute ſhall have this intendment, that this Proviſo ſhall extend only to Executions upon Judgments given in Cities and Towns Corporate, and not where Judgment is given in this Court, or the Common Pleas, and Executions are only there, and this ſeems to be a reaſonable conſtruction; Executions in Towns corporate, to wit, Executions upon Judgments given in Towns corporate. If the Sheriff make execution at the Town ſide he ſhal have for his fees as the Statute limits, & therfore he ſhall have it if within the Town, & if this ſhould not

be ſo, this miſchief would enſue, that preſently when an Execution iſſues out againſt a man, he wil ſhelter himſelf in a Town corporate, as in a Sanctuary, and the Sheriff will not do execution there, becauſe he ſhall not have ſo great a Fee for doing it as if it were in another place, and ſo execution (which is the life of the Law) ſhall be undone.

Jermy for the Defendant; and firſt, if the ſumm exceed a 100 l. he ſhall have but 6 d. for every 20 s. of all. It is conſiderable that at Common Law the Sheriff ought to do execution freely without any recompence. In Both and Sadlers caſe lately in this place, an action upon the caſe was brought by a Bailiff, that wheras a Warrant for taking ſuch a man was directed to him, the Defendant promiſed him 40 s. for his pains, he took the man and brought an action for the 40 s. and it was agreed that he ſhould not have it. The Law abhors that great Fees ſhall be given for executions, Co. lib. 3. 7. in Heydons caſe: In the expoſition of the Statute three things are conſiderable.

1. What the Common Law was before the making of it.
2. What the miſchief was at the Common Law.
3. The remedy which the Statute gives.
4. The true reaſon of the remedy. The Common Law was, that the Sheriff ſhall not take any Fee for execution, Ergo now he ſhall take as ſmall a fee as may be, becauſe this is nigheſt to the common Law: And the firſt words are declarative what Fees he ſhall take; and the ſubſequent words affirmative what Fees they may now take, to wit, where the ſumm doth not exceed a 100 l. 12 d. for every 20 s. 14 Jac. It was objected, that the Sheriff is not bound to do execution before he hath his Fee, and then it was reſolved that he might have an action of Debt, and ſo it ſeems that the party is not bound to give levying money before that the execution be done, and otherwiſe, the party Plaintiff may be at great miſchief if the other be not taken: And it hath been agreed lately in the Common Pleas, that if the ſumm exceed 100 l. he ſhall have but 6 d. for every 20 s. And as to the ſecond point, he endeavoured to maintain that the Proviſo extends to executions in Towns corporate, although the Judgments upon which the executions iſſue are given in other Courts, and this is the conſtant practiſe of the City of London.

The Judges delivered their opinion, with a proteſtation, that they might recall them, if afterwards better reaſon appeared.

Crew chief Juſtice was of opinion that he ſhall have but 6 d. for every 20 s. if the ſumm exceed 100 l. and the ſumm ſhall not be divided, but if the ſumm be under a 100 l. then 12 d. for every 20 s. and this is the reaſon of the Law.

And for the ſecond point, although the Judgment be given in the ſuperior Court, yet if the Sheriff does execution there, he ſhall have his levying money, and this is within the intention of the Proviſo.

Doderidge, Juſtice the firſt queſtion is upon the expoſition of the Statute, the ſecond upon the Proviſo: For the firſt two expoſitions may be made as hath been remembred, then we will enquire of the interpretation: This Statute was made for the benefit of Sheriffs, that as they are in hazard by taking of men, becauſe many times reſiſtance was made. 2. When the Sheriff had taken a man, and in the carriage of him to priſon he had eſcaped, an action upon the caſe did lye againſt the Sheriff, and when he had him in priſon, he ought to have great care in keeping of him, for an action lies againſt him if he eſcape: and therfore although on the one ſide there was a great miſchief by reaſon of great Fees that the Sheriff took for execution; ſo on the other ſide, the Law tendred Sheriffs in reſpect of the hazard and care which they had of men in execution, and therfore the Law in an indifferency provides that the Sheriff ſhall have a good Fee for execution, and alſo it provides againſt his extortion, and ſo it is indifferent between the oppreſſion of the Sheriff and covetouſneſſe, and we are not to judge according

to

to the intent, but according to the equity of the Law, for equality to prevent the covetouſneſſe of Sheriffs and the oppreſſion of the people; then in this caſe if he ſhall have but 6 d. for every 20 s. for 200 l. he ſhall have no more for execution of 200 l. then if it were a 100 l. But I think this was not the intent of the Act.

For the ſecond point, I take it that this Statute did not extend to Suits within Towns corporate, and executions upon them, for they are not at any great trouble for doing of execution within their Towns, nor hazard: But if a Sheriff does execution in a Town corporate, then he ſhall have according to the Statute, for it may be that the Priſon is far diſtant. And I upon the ſuddain conceive that this Proviſo extends only to Towns corporate, which are Counties.

Jones Juſtice, three queſtions have been made upon this Statute.

1. For the nature of the action which the Sheriff is to have upon this Statute, and for that it hath been many times reſolved that he ſhall have an action of Debt, for when a remedy is given by a Statute, and no action is given by the ſame Statute wherby the penalty ſhall be recovered, there he ſhall have an action of Debt.

2. Who ſhall have the Fee when the Sheriff makes a Warrant to a Bayliff of a liberty, the Bayliff of the liberty or the Sheriff.

The ſecond branch of the ſecond queſtion is, that when one Sheriff makes the extent, and another Sheriff makes the Liberate, who ſhall have the Fee?

3. The third queſtion hath been in debate in the Common Pleas, and there was ſome opinion that if the ſumm be above a 100 l. and under 200 l. that the Sheriff ſhall have 12 d. for every 20 s. of the firſt 100 l. for otherwiſe the Sheriff ſhall have a leſſe for execution of 199 l. then he ſhall have for 100 l. But if it be above 200 l. he ſhall have 6 d. ab initio.

My opinion on the ſuddain is, that for every 20 s. of the firſt 100 l. he ſhall have 12 d. and for the reſidue he ſhall have 6 d. for every 20 s. and the other ſhall not be altered.

And for the ſecond point, I hold that this Proviſo extends only to Judgments originally commenced in Towns corporate, and not to executions upon Judgments given in ſuperior Courts, for then the Sheriff does execution as an Officer to theſe Courts: And the Sheriff of the County is at as great pains, as if he were Sheriff of another County, and ſhall not be bound by the Proviſo.

Whitlock Juſtice was for the Plaintiff in both the points, to wit, that the Sheriff ſhall have 1 s. for every 20 s. of the firſt 100 l. and 6 d. for every 20 s. of the reſidue. And by him the Sheriff may refuſe to do execution untill the levying money be paid to him.

And for the ſecond point, the Sheriff of the County of the City is not within the Proviſo, but ſhall have the Fees by the Statute provided, as well as the Sheriff of the County ſhall have, for the words are generall, and the exception goes to all Towns corporate and Cities, but doth not ſay Cities which are Counties, and therfore this Sheriff is within the benefit of this Law: And in Michaelmas Term next following the caſe was moved again by Whitlock for the Plaintiff, and he ſaid, that he would not ſpeak to the ſecond point, becauſe the Court had delivered their opinion, that the Proviſo in the Statute, that this ſhall not extend to executions in Towns corporate, it is to be intended of executions in Towns corporate upon Judgments there given: But for executions there upon Judgments given in this Court, or any other ſuperior Court, the Sheriff ſhall have ſuch Fees as are limited by this Statute. And the Court ſaid to him that were agreed of it.

And as for the firſt point, he conceived that the Sheriff ſhall have 12 d. for levying of every 20 s. of the firſt 100 l. and 6 d. of every pound more, and this

this appears cleerly by the Letter of the Statute: And the caſe in Mich. 19 Jac. in C.B. between Empſon and Bathirſt doth not make againſt it, for the reſolution of the ſaid caſe was upon other matters: The caſe being, a man was bound in a Statute of 120 l. the Sheriff extends, and before the Liberate takes double Bond of the party for payment of his Fees, and afterwards brought Debt againſt the party, who pleads the ſaid matter in Bar, and the Statute of 23 H.6. cap. 10. And in the caſe were three points.

1. Whether the Sheriff may take a double Bond for the payment of his Fees, and it was reſolved that the Bond was void, for the Sheriff might have Debt upon the Statute for his Fees.

2. Whether the Sheriff ſhall have his Fees before the Liberate, and reſolved that he ſhall not.

3. Was this very queſtion, and two Juſtices were againſt one, that where the ſumm exceed 100 l. he ſhall have but 6 d. for levying of every 20 s. of the firſt 100 l. But the Judgment was given upon the other points. All the Court ſeemed to be of opinion that he ſhall have 12 d. for every 20 s. of the firſt 100 l. and 6 d. for every 20 s. of the reſidue.

The ſame Term in the ſame Court.

Awdeley *verſus* Joye.

Awdeley being put out of the Town-Clarkſhip of Bedford, moved for a Writ of Reſtitution to the place, and it ſeemed to Doderidge Juſtice that the Juſtices of this Court have power to grant reſtitution in this caſe, and he cited a caſe in 16 Eliz. in this Court, where reſtitution was granted in ſuch a caſe, and 43 Eliz. by warrant of Fennor Juſtice, a Writ of Reſtitution was granted.

A Writ of Reſtitution to a Town-Clark being ouſted of his Office.

One who was Town Clark of Boſton for life, was made Alder-man and put out of his Clarkſhip, and was reſtored. This Court hath power not only in judiciall things, but alſo in ſome things which are extrajudicial. The Major and Commonalty of Coventry diſplaced one of the Alder-men, and he was reſtored; And this thing is peculiar to this Court, and is one of the flowers of it.

Crew chief Juſtice, doubted whether reſtitution could be made to Awdeley, or no, becauſe the Office was granted to him in Reverſion, when it was expectant upon an Eſtate for life, and when the Officer for life died, Joye was elected, and he ſaid, that all the ſaid Writs remembred are, where he had once poſſeſſion.

Whitlock Juſtice, in the caſe of one Conſtable, 10 Eliz. It was reſolved that this Court hath power to grant reſtitution in ſuch a caſe, where he was put out of his Office: And by Jones Juſtice, this Court hath power to grant Reſtitution, and he remembred, one Mittlecots caſe: And Noy being of Counſell with Awdeley ſaid, that there are Preſidents to prove this in the times of E.2.E.3. and H.6. And it was ſaid by the Juſtices that they are the chief Conſervators of the Peace within the Realm, and therefore have power for the preſervation of the Peace in ſuch factious Towns to grant reſtitution.

The

The ſame Term in the ſame Court.

Dabborne *verſus* Martin.

THomas Dabborne brought an action upon the caſe againſt Martin for theſe words, Thou art a Knave of Record, and a forgering Knave: And it was argued by Jermy for the Defendant, that the words were not actionable, for a Knave ſignifies a Male-child, ſo that it is no more then to ſay, Thou art a Male-child of Record: And for forgering Knave, the action will not lye, for Forger is a generall word, and may be applied to divers Trades, as forgering Smith, forgering Goldſmith; and when he called him forgering Knave, there was no communication of his Office, 18 Jac. Sir William Brunskill brought an action upon the caſe, and declared that he was well diſcended, and was a Gentleman of the Chamber to Prince Henry, and he brought an action for theſe words, Thou art a Coſener, and liveſt by coſenage, and adjudged not actionable, Co. lib. 4. 16. Action upon the caſe doth not lye for theſe words, Thou art a corrupt man, if there were no communication touching his Profeſſion; And it was argued for the Plaintiff that the words were actionable, for it lyeth for theſe words, Thou art an Out-putterer, if they were ſpoken in Northumberland where they are underſtood, but not here, becauſe they have no ſignification: And the words here are ſpeciall and ſhall have reference to his Office, and ſhall have ſuch an interpretation as is now uſed, and now Knave hath no ſignification of Male-child. Words, *Thou art a Knave of Record.*

Jones Juſtice ſaid, that if one ſaith, that ſuch a one is a corrupt Judge, action lies, or if one ſaith of a Clark, that he is a forging Clark, action lies: And in 28 Eliz. the opinion of Juſtice Fennor was, that for theſe words (Thou haſt forged my Fathers Will) action lies.

Crew ſaid, that he did not underſtand the word (Forgering) but for calling one Knave of Record, action lies. And Doderidge Juſtice ſaid, that he never gave way to theſe actions upon the caſe for words: And no opinion was given this day.

The ſame Term in the ſame Court.

Goodwin *verſus* Willoughby.

GOodwin brought an action upon the caſe againſt Joane Willoughby wife of Thomas Willoughby, and upon non Aſſumpſit pleaded, it being found for the Plaintiff, it was moved in Arreſt of Judgment. 1. That the Plaintiff ſhews that Thomas Willoughby was indebted upon account, and doth not ſhew that Joane Willoughby is Executrix or Adminiſtratrix, and yet that ſhe promiſed to pay, whereas in truth ſhe hath no cauſe to pay, for there is no conſideration, and ſo Nudum pactum.

Jermy for the Plaintiff: for the firſt, becauſe it doth not appear for what cauſe he accounted; I anſwer, that this is but a meer conveyance: And for the ſecond, that ſhe does not ſuppoſe that the Feme is executrix, &c. But here is a good conſideration, which is, that ſhe ſhall not ſue or moleſt, and that he gave day for payment, this is a ſufficient conſideration. But Stone of counſell with the Defendant ſaid, that the firſt is the ground of the action, and therfore he ought to ſhew for what he accounted.

Crew chief Juſtice, two exceptions have been taken, 1. For the alledging the manner of the account, which I conceive is good enough, and he need not ſhew the cauſe of the account: And as to the ſecond, becauſe it doth not appear that ſhe is Executrix, or Adminiſtratrix, and ſo no conſideration, and ſo no Aſſumpſit: But here ſhe aſſumes to be Debtor and makes a promiſe to pay, which is an acknowledgment of the Debt by inference, and therefore he conceived that the Aſſumpſit was good.

Doderidge Juſtice, for the firſt it is good enough, yet Cum indebitatus exiſtit is no good Aſſumpſit, but here he ſhews a ſpeciall way of Debt, and it would be long and tedious to deſcribe his account. For the ſecond there is no cauſe of action, becauſe it doth not appear that ſhe is Executrix or Adminiſtratrix, or Executrix of her own wrong.

Where forbearance without cauſe of action, is no ground of an *Aſſumpſit*.

If I ſay to one do not trouble me, and I will give you ſo much, this is not actionable, for there ought to be a lawfull ground, and for this cauſe the Declaration is void, for it is only to avoid moleſtation: Give me time, &c. this is no good Aſſumpſit, for forbearance is no ground of action where he hath no cauſe to have Debt.

Jones Juſtice agreed in the firſt with them, becauſe a generall action upon the caſe ſufficeth, and in truth it is but an inducement to the action; but for the other part he doubted, and he cited one Withypools caſe, an Infant within age, promiſed to pay certain money, he makes an Executor and dies within age; the Executor ſaith to him to whom the promiſe is made, forbear and I will pay you, and there an action upon the caſe did lye againſt the Executor upon this promiſe, and yet it was a void Contract, but there was colour of action, forbear till ſuch a time, now the other hath loſt the advantage of his Suit: But he gave no opinion.

Crew, It is a violent preſumption that he is indebted: But by Doderidge here is no colour to charge her, but only by inference that ſhe is Executrix.

If a ſtranger ſaith, forbear ſuch a Debt of J.S. and I will pay it, it is a good conſideration for the loſſe to the Plaintiff, and in this caſe it appears not that there is any cauſe, and Broom Secondary ſaid, that Withypools caſe before cited was reverſed in the Exchequer Chamber.

Jones, If an Infant makes a promiſe, it is void, and he may plead non Aſſumpſit, which Doderidge did not deny: But upon his Obligation he cannot plead Non eſt factum, for he ſaid that he ſhall be bound by his hands, but not by his mouth.

The ſame Term in the ſame Court.

Drope *verſus* Theyar.

IN Debt by Drope againſt Theyar an Inne-keeper upon Iſſue joyned, and a Verdict for the Plaintiff, Bolſtred moved in Arreſt of judgment for the Defendant, and the matter was that one Rowly who was ſervant to Drope, lodged in the White Heart at S. Giles, and there had certain Goods of his Maſters which were ſtoln from him in the night, and Drope the Maſter brought an action thereupon, and it was moved by Bolſtred that the Plaintiff was without remedy.

1. Becauſe it was in an Inne in London, for the Regiſter 105. is Quando quis depræ datus eſt per patriam, which (as he ſaid) could not be extended to an Inne in London.

2. It ought to be an Inne, as Inne-keeper.

3. He

3. He ought to be as a Gueſt lodging, and this appeareth in Culeys caſe, in 5 Jac. in Celly and Clarks caſe (which was entred Paſch. 4. Jac. Rot. 254. It was adjudged that where the Gueſt give his Goods to his Hoſt to deliver to him three daies after, and the goods are loſt, that an action is not maintainable againſt the Inne-keeper for them, and this was in an Inne in Uxbridge: And in one Sands caſe, where the Gueſt came in the morning, and his Goods were taken before night, he ſhall have an action againſt the Inne-keeper.

4. The Goods ought to be the Goods of the party who lodgeth there, for the words are Ita quod hoſpitibus damna non eveniunt, and here the Maſter who brought the action was not Gueſt: But admit the Maſter ſhall have the action, yet he ought to alledge a cuſtom that the Maſter ſhall have the action for the Goods taken from his Servant, Trin. 17 Jac. Rot. 1535. Bidle, and the Maſter brought an action for Goods taken from the Servant, and there it was reſolved that he ought to conclude that Pro defectu, &c. and apply the cuſtom to him being Maſter: See Co. Book of Entries 345. And that a cuſtom, that for other mens Goods in the cuſtody of Gueſts, the Owner ſhall have an action againſt the Inne-keeper if they be ſtollen.

Ob. This is the Common Law, and therfore ought not to be alledged.

Anſw. Where a man takes upon him to ſhew a cuſtom, he ought to ſhew it preciſely, he cited Heydons caſe, Co. lib. 3. 28 H. 8. Dyer 38. And it was ſaid for the Plaintiff that Goods are in the poſſeſſion of the Maſter which are in the poſſeſſion of his Servant, and ſo here the Maſter might have had action well enough, 8 E. 4. my Servant makes a Contract, or buies Goods to my uſe, I am liable and it is my act.

By the Court an Inne in London is an Inns, and if a Gueſt be robbed in ſuch an Inns, he ſhall have remedy as if he were Inns per patriam: But the cheife point was, whether the maſter ſhall have the action in the caſe where the Servant loſt the goods, and by Jones Juſtice in 26 Eliz. in C.B. upon the Statute of Hue and Cry it was reſolved that if the Servant be robbed the Maſter may have the Action, and ſo by him ſhall it be in the caſe Doderidge Juſtice, the Servant may have the Action alſo: If the Servant be robbed of wares, the Maſter or Servant may have an appeale 8. E. 2. Tit. Robbery; two joynt Merchants, one is Robbed both ſhall joyne in the Action and may alſo joyn in the appeal. But it may be objected (as Whitlock Juſtice did) that the Maſter is not Hoſpitans, I ſay this is to no purpoſe; A man put his Horſe in the Stable, and before he goes to bed or lodging, the Horſe is gone, he ſhall have an action although he did not lodge there. For the word (tranſeuntes) although he be at the end of his Journey, yet it is within the cuſtom, and he ſhall have action. And by Crew, if I ſend cloath to a Taylor, and it is ſtoln from him, the Taylor ſhall have an action of treſpaſſe, or the Owner.

Jones, the caſe of Hue and Cry is a more ſtronger caſe then this is, for there the Servant ought to ſwear that he is robbed, and yet the Maſter ſhall have an action: And for the word (tranſeuntes) all agree that although he be at the end of his journey, or at an Inne in London, yet he is within the remedy of this Law: And if a man ſtay in an Inne a moneth, or a quarter of a year, ſhall not he have an action if he loſe his Goods?

Doderidge agreed, that if a man be boarded in an Inns, and his Goods are ſtoln, he ſhall not have an action upon this Law. And notwithſtanding this objection, judgment was given for the Plaintiff upon the Verdict.

Trin.

Trin. Term, 2 Car. In the Kings Bench.

Sir William Buttons *Caſe*.

Words, *Sir William Buttons men have ſtoln Sheep, and he ſpake to me that I ſhould not proſecute them,*

SIr William Button a Juſtice of Peace brought an action for theſe words; Sir William Buttons men have ſtoln Sheep, and he ſpake to me that I ſhould not proſecute them, and it ſeems that the action did not lye, becauſe Sir William did not aver that he is a Juſtice of Peace, and it doth not appear in what County the ſaid Felony was done, 36 Eliz. One brought an action for theſe words; A. is a coſening fellow, and the greateſt Pickpurſe in Northamptonſhire, and there is not a Purſe picked within 40 miles of Northampton but he hath a hand in it, And the action did not lye becauſe he did not aver that there were Purſes cut.

Jones Juſtice put this caſe, One ſaith, that A. is as ſtrong a Thief as any is in Warwick Gaol, he ought to aver that there is a Theef in Warwick Gaol, or otherwiſe they are not actionable.

Doderidge put this caſe, There is a neſt of Theeves at Dale, and Sir John Bridges is the maintainer of them, theſe are actionable, becauſe it implies maintenance.

Note that it appeared upon a motion which the Attorney-generall made againſt one Lane (who is a Recuſant in Northamptonſhire) that a Leaſe for years made by a Recuſant of his own Lands after conviction, if it be Bona fide will bind the King, but if it be upon fraud and covin, then it will not; and Whitlock ſaid, that it is a common courſe for Recuſants to make Leaſes after their Indictment and before conviction.

The ſame Term in the ſame Court.

The Caſe of the Major, Bayliffs, and Jurates of *Maidſtone*.

IN a Quo warranto depending againſt the Mayor, Bayliffs, and Jurates of Maidſtone in Kent, Serjeant Finch of Counſell with them of Maidſtone, put the caſe briefly in effect thus: In the Quo warranto againſt them, it was ordered by the Court that they ſhould have day to plead untill a fortnight after Trinity Term, and the truth was that they had not pleaded accordingly, wherupon Judgment was entred in the Roll, and the Writ of Seiſin awarded, and execution therupon; and afterwards by a private order in the Vacation by the chief Juſtice and Juſtice Jones, it was ordered that the Judgment ſhould be ſtaid, and the truth was, that it was never entred amongſt the Rules of the Court, and therfore he prayed that the Judgment might not be filed, but that the laſt order might be obſerved, and that they might amend their Plea.

Hendon Serjeant on the other ſide ſaid, that it could not be, for by the Judgment given the King was intitled to have the profits of Franchiſes which he ſhal not loſe; he cited the caſe which is in F.N.B. 21. Errors in B.R. cannot be reverſed the ſame Term before the ſame Juſtices without a Writ of Error, but otherwiſe it is in C.B. and he ſaid, that the ſame courſe was obſerved in Eyre, there can be no pleading in Eyre after the Eyre determined, and upon this he cited the caſe of 15 E. 4. 7. before the Juſtices in Eyre, if the Defendant does not come the Franchiſes ſhall be ſeiſed into the Kings hands,

hands, nomine deſtinctionis, and if the party who ought the Franchiſe doth not come during the Eyre in the ſame County, he ſhall forfeit his Franchiſe for ever, ſo here after Judgement entred, there can be no plea per que &c. Finch we have order from the Court for ſtay of Judgement, & here no perfect Judgement was given: and this is not without preſident, and he cited one Chamberlains Caſe, where the Judgement was nigh to perfection &c. but he did not put the Caſe Creve ch: Juſtice: in this caſe there was the aſſent of the Attorney generall, who proſecuted the Quo Warranto, and ſo the caſes put by Hendon to no purpoſe, Jones upon F. N B. 21. J. took this difference, true it is that the Kings Bench cannot reverſe a Judgement although it be in the ſame term without a Writ of Error, but this is where error lies in the ſame cauſe in the ſame Court, as upon outlawry, but if no error lies in this Court for the ſame cauſe, but in Parliament- then the Kings Bench may reverſe the Judgement without Writ of Error being the ſame term. And the Judgement here was ever of Record, for the Roll untill it be fixed amongſt other Rolls is no Record.

where the Kings Bench may reverſe its owne judgmēt without Writ of Error, and where not.

And for the Caſe of 15. E. 4. 7. it is not like our caſe in reaſon, for when the Eyre is determined the power of the Juſtices in Eyre is alſo determined, but it is not ſo here, for the Juſtices have power from Term to Term: But Noy argued further for the King, that it is a Judgement of another Term, and Execution awarded upon it, and ſaid that it is without preſident that now it ſhould be avoyded, and upon the awarding of execution, the King under his ſeal hath averred that judgement is given which cannot be falſified, and for Chamberlains Caſe he ſaid that there was an aſſent in it. Doderidge, the Queſtion which now is moved, is but this, whether a Judgement entered in a private Roll (as a memorandum), and afterwards there is an order that the Judgement ſhall not be filed, if the Judgement upon this ſhall be ſtayd: and ſpeaks to it, and by him the Caſe of 15. E. 4. 7. is nothing to this purpoſe, for Juſtices in Eyre were Juſtices by commiſſion, and they had not the cuſtody of their Records, and ſo it differs from this caſe.

when a Roll is become a Record.

And Jones Juſtice (which was not denyed) if a Judgement be pronounced here and be not entered, the Judges may alter it the next Term. It was ſaid by Noy in this caſe that all Franchiſes in England are againſt common Right, and execution of Juſtice, and for the preſent purpoſe, he cited one Sir John Wells Caſe, where in a Quo Warranto the Defendant had day to plead, or otherwiſe that judgement ſhould be entered to ſeiſe, and he failed to plead at the day, and the Judgement was not filed, and yet he could not be relieved: But it was ſayd by ſome of the Juſtices, that this was a caſe of great extremity. But by Hendon it was affirmed in the Exchequer in one Sanderſons Caſe, and in the principall caſe the matter was adjourned for a fortnight, and ordered that the plea ſhould be accepted.

Mich. Term 2. Car. in the Kings Bench.

Sharp *verſus* Ruſt.

IN an Action upon the Caſe, upon an Aſſumpſit between Sharp, Plaintiff, and Walter Ruſt Defendant, upon non-Aſſumpſit pleaded, it was found for the Plaintiff, and it was moved in arreſt of judgement upon theſe words in the Declaration, the Defendant (being Father to the Plaintiffs Wife, for whom the Apparrel was bought) ſaid to the Plaintiff, deliver the Apparrel to my Daughter, and I will pay for them, and ſaith not to whom the pay-

ment ſhall be made: And it was argued by Woobrich of Grayes-Inne that this is no ſufficient cauſe to ſtay the Judgement, for by neceſſary implication and reference of the words precedent, the certainty of the perſon appeareth to whom the payment ought to be made. And he obſerved that in our Law the time, the eſtate, the thing, and the perſon not being ſufficiently expreſſed, yet by neceſſary coherence and relation to matter precedent, they are ſometimes made certain enough: 1. For the time, Perkins. P. 496. puts the Rule, if a condition hath relation to an act precedent, and no time is limited when it ſhall be done, yet it ought to be done when the act precedent is done, and therefore if I. S. be bound to me in 20 l. upon condition that if I enfeoff him of black acre, that then he wil pay me 10 l. &c. in this caſe preſently when I have enfeoffed the obligor of black acre he ought to pay the 10 l. notwithſtanding there be no time limited when it ſhould be payd. 2. For the thing being put incertainly, yet the communication precedent makes this certain, 30. H. 8. Dyer 42. in the Caſe of the Executors of Greenliffe, where it is agreed, that albeit it is not ſhown what thing is granted, yet it ſhall be the Land of which the communication was. 3. For the Eſtate, although it be incertain, yet ſometimes it is made certain by the matter precedent, as in the Caſe Co. lib. 8. A Stewardſhip was granted for life, and afterwards an Annuity was granted for the exerciſe of that Office, without declaring what Eſtate he ſhould have in that Annuity, and reſolved that he ſhould have the Annuity for life, becauſe he had the Office for life. 4. For the perſon, the conſideration ſometimes aſcertains the perſon, and therefore if land be given to one by Deed, habendum ſibi una cum filia donatoris, in frankmariage, this ſhall enure to both, becauſe the Feme is Cauſa donationis, and by intendment of law the Land and the feme ſhal be given together to the man for the advancement of the Feme, as it is Mich. 2. & 3. Ph. & Mary. Dyer 126. a 4. E. 3. 4. Plow. Com. 158. enfeoff him & another, and bind him and his heirs to warrant, & doth not ſay to whom he ſhall warrant, yet the Feoffee and his heirs ſhall have advantage of this warranty, for it cannot have any other intendment: 6. E. 2. Voucher. 258. 22. E. 4. 16. & Kelleway 108. & Co. lib. 8. Whitlocks Caſe, In a Leaſe for years reſerving rent, it is the ſureſt way to make the reſervation to no perſon in certain, but to leave it to the general intendment of the Law, 15. H. 7. A man deviſeth that his Land ſhall be ſold for the payment of his debts, and doth not ſay by whom, they ſhall be ſold by his Executors, becauſe they are lyable for the payment of his debts, but if one deviſe that his land ſhall be ſold, & ſaith not for the payment of his debts, the deviſe is void, becauſe the Law doth not intend in this caſe to make the ſale 40 E. 3. 5. 4. E. 3. Fitzherbert Obligation 16. Nota, if a man be bound in debt or Covenant by writing, and puts ſuch a clauſe in the writing. Et ad majorem hujus rei ſecuritatem invenit fidei juſſores quorum unuſquiſque in tot. & in ſolido ſe obligavit, that although none ſpeak there but the principall in the writing, if the others put to their ſeals, they accept that which the principal ſpake, & ſo become principal: 2. E 4. 20. and here in our Caſe it appeareth that the Deed was ſo, & therefore it is reaſon that the Declaration ſhould be ſo, for there cannot be a material difference betwen the Declaration & the deed, & eſpecially being upon an agreement which is to be ruled according to the intention of the parties, as it is in Plow: Com. 140. a. In our Law if any parties be agreed upon a thing, and words are expreſſed or written to make the agreement, although they be not apt words, yet if they have ſubſtance in them tending to the effect intended, the Law ſhall take them of the ſame ſubſtance as words uſuall, for the Law regards the intention of the parties, and here the intent appeareth that the aſſumption ſhall be made to the Plaintiff, although there want expreſſe words, and therefore he prayed Judgement for the Plaintiff. And afterwards the ſame Term Judgement was given for the Plaintiff.

Where a thing incertain may be made certain both in time, eſtate, and perſon.

Intention of parties to be obſerved.

The

The ſame Term in the ſame Court.

Beven *verſus* Cowling.

IN an Action upon the Caſe Littleton mooved in arreſt of Judgment for the Defendant, wherein the Caſe was this, the Defendant aſſumed that if the Defendant would defer the payment of a bond, in which one A. was bound to him, and would not implead him upon it, then he promiſed to pay it, and he doth not ſay, that he deferred the payment untill ſuch a day, and therefore this is no valuable conſideration, ſo that the action doth not lye, for notwithſtanding this he may implead him preſently. Mich. 12. Jac. Kebles Caſe, A man promiſeth to pay ſo much in conſideration of a Leaſe at Will, and it was holden no good conſideration, for by the ſame breath that he creates it, he may defeat it. & Paſch. 8. Jac. Auſtins Caſe: A man promiſe that in conſideration he would forbear another, he would pay it, and no time was limited, and therefore it was holden no good conſideration. Trin. 38. Eliz. Rot. 523. A man promiſe quod non implacitabit, and avers quod non implacitavit, and becauſe of the uncertainty it was holden no valuable conſideration.

Action upon the Caſe, upon a promiſe, that if he would not ſue ſuch a one, he would pay it, where good, & where not.

Doderidge Juſtice: If there be no conſideration at the time, or no cauſe of Action, the forbearance afterwards will not make it actionable, and he ſaid that it had been adjudged in this Court, that a conſideration to forbear for a little time is not good, but by ſome to forbear for a reaſonable time is good. But in the principall Caſe upon the hearing of the Declaration read, it appeared, that it was, that he ſhould never implead him upon the ſaid obligation, ſo that if the Plaintiff brings an Action upon the obligation, the Defendant here may have an Action upon the Caſe againſt him. Alſo it was non implacitabit, and this ſhall be taken indefinitely, quod nunquam implacitabit, and therefore the Judgement was affirmed, for otherwiſe the Plaintiff ſhall both take advantage of this promiſe and of the bond alſo, and here he hath in a manner forſaken the benefit of his bond, and hath betaken himſelfe to the benefit of this Aſſumpſit.

By Jones and Whitlock Juſtices, if A. be bound to me, and I enter into bond to him, that I will not ſue this Obligation, I cannot ſue him upon the firſt Obligation, without forfeiture of my bond: and by Doderidge, if an Obligation be forfeited, and I ſay to the Obligee, do not ſue the Obligor, or do not implead him, an Action upon the caſe lies againſt me.

The ſame Term in the ſame Court.

Arnold *verſus* Dichton.

IN an Action upon the Caſe, and Non-Aſſumpſit pleaded, it was found for the Plaintiff, and Noy mooved in arreſt of Judgement, that there was no conſideration to maintain this Action, the Caſe being thus: Arnold having married the Daughter of the Defendents Teſtator, the Teſtator promiſed to give him 40 l. and meat and drink for a year, and a Featherbed and Bolſter, and afterwards the Teſtator in conſideration that the Plaintiff would forbear to ſue him all his life for it, promiſed that he ſhould have as good a portion at his death as any of his children, and the Plaintiff declares, that he

Aſſumpſit.

he gave to one Tho. P. one of his Sons 200 l. and that he left him at the time of his death, but 30 l. but when he gave to Tho. P. the 200 l. appeares not, peradventure it might be in his life time, and this promiſe doth not extend to that which he had given before, as if a man be bound to keep a Goale, and that no priſoner ſhall eſcape, this only extends to a future keeping, and future eſcapes, and not to other eſcapes which were before.

True it is, that ſometimes the Law will alter the ſenſe, as in the Caſe of 32. H. 6. where a man is bound that his Feoffees &c. And at another day Doderidge ſaid, that the firſt promiſe was but an inducement to the ſecond, and the Defendant hath pleaded Non Aſſumpſit to the laſt promiſe, and then comes the Plaintiff and ſhews that he gave to ſuch a one 200 l. and doth not ſhew when this was given, and this may be before the promiſe, and therefore I conceive the Declaration is not good: Jones agreed that the Declaration is not good, for admit that in this caſe he had given to all his children but one, great portions before the ſaid promiſe, and had given a ſmall portion to one after the promiſe, the Plaintiff now ſhall have but according to the ſaid promiſe, and it is alledged here, that he gave to ſuch a one 200 l. which may be before the promiſe, and therefore the breach not well laid.

Whitlock contra: and that the Plaintiff ſhall have according to the beſt gift in this caſe, whether it were before or after the promiſe, and that upon the intention of the promiſe; for the intention is, that the Plaintiff ſhould have as good a marriage or portion with his Daughter, as any other of his children ſhould have: But by Doderidge this conſtruction cannot be made without offering violence to the words, for then daret ſhould be for deciſſet, and for any thing which appeareth he had a portion before, and this was but a ſuperaddition.

Jones put this caſe: I am bound to enfeoff J. S. of ſo much Land as I will enfeoff J. D. this extends not to a Feoffment which I have made to J. D. before, but only to a Feoffment which I ſhall make to him afterwards, which was not denied by Whitlock, and it was adjourned.

The ſame Term, in the ſame Court.

Barker *verſus* Ringroſe.

BArker brought an Action upon the Caſe againſt Ringroſe, and declared, that whereas he was of good fame, and exerciſed the Trade of a Wool-winder, the Defendant ſpake theſe ſcandalous words of him, that he was a Bankrupt Rogue: and it was moved in arreſt of Judgement, that thoſe words were not actionable; for the words themſelves are not actionable, but as they concern an Office or Trade &c. and it appeareth by the Statute of 27. E. 3. that a Wool-winder is not any Trade, but is but in the nature of a Porter, ſo that the Plaintiff is not defamed in his function, becauſe he hath not any: alſo it is not averred that he was a Wool-winder at the time of the words ſpeaking.

Words. *Thou art a bankrupt Rogue*

Jones Juſtice: If one ſaith of a Wool-winder, that he is a falſe Wool-winder, action upon the Caſe lieth; and it was demanded by the Court, what a Wool-winder was? and it was anſwered that in the Countrey he is taken to be a Wool-winder that makes up the fleece, and takes the dirt out of it: and a Wool-winder in London opens the fleeces, and makes them more curiouſly up, and in London they belong to the Mayn of the ſtaple.

A Wool-winder what he is.

Doderidge

Doderidge, If one ſaith of a Sher-man, that he is a Bankrupt, Action lyes, and ſo it hath been adjudged of a Shoo-maker: and note that if one ſaith of any man (who by his Trade may become a Bankrupt within the Statutes) that he is a Bankrupt, an Action lies, as of a Taylor, Fuller, &c. And the Court ſeemed to incline, that in this caſe (being ſpoken of a Wool-winder in London) the Action lies: But Mich. 3. Car. the Caſe being moved again, the Court was of opinion, that the Action could not lye, and would not give Judgement for the Plaintiff.

In what caſe to call a man Bankrupt, is actionable.

The ſame Term in the ſame Court.

NOta by Doderidge and Jones, Juſtices, that upon the principall Judgement reverſed, the outlawry is alſo Ipſo facto reverſed: Alſo if an outlawry be awarded, if it be not per Judicium Coronator (unleſſe it be in London) the outlawry is voyd.

Outlawry reverſed upon reverſall of the principall judgement.

It was demanded by the Juſtices, when the outlawry and Judgement are affirmed, how the entry is? And it was anſwered by Broome Secondary, that the entry is generall, Quod judicium affirmetur in omnibus: and this ſufficeth.

But if the Judgement be affirmed, and the outlawry reverſed, then the entry is. Quod judicium affirmetur & Utlagario caſſetur.

The ſame Term in the ſame Court.

Calfe, *and others*, *verſus* Nevil *and others*.

A Scire facias was brought by Joſeph Calfe and Joſhua, Executors of A. againſt Nevil Davyes and Bingley, and the Caſe was this: they became bayle to one Hall (who was condemned in an Action to the Teſtator of the Plaintiff) that the ſaid Hall ſhould either render his body to Priſon, or that he ſhould ſatisfie the Judgement, the Defendents Plead, that after the Scire facias returned, and preſently after the Judgement, the ſaid Hall brought a Writ of Error in the Exchequor Chamber, hanging which, the ſaid Hall, reddidit ſe priſonæ in exoneratione manucaptorum ſuor: and there dyed; and the Plaintiffe demurred upon this Plea, becauſe it was double, and Calthorp argued for the Plaintiff, that it was double or rather treble.

1. That Reddidit ſe priſonæ.
2. That he was impriſoned.
3. that he dyed in Priſon.

And to prove the Plea double in this Caſe, he cited 13. H. 8. 15. 16. 4. E. 4. 4. 21. H. 7. 10. The ſecond matter that he moved againſt the former was, that pendant the Writ of Error reddidit ſe priſonæ, and doth not conclude upon the Record, & hoc peratus eſt verificare, as he ought to have done, and for this he cited 7. H. 8. Kelleway 118.

If J. S. bee bound in a Recognizance, that A. ſhall appeare ſuch a day before the Kings Juſtices at Weſtminſter, if his appearance be not recorded hee ſhall not have any averment, by Bricknell, and

Conisby, and in 30. Eliz. It was one Wicks Caſe, which is ours in effect in caſe of baile, Dyer 27. 6. E. 4. 1. 2. For the matter the Plea is nought, 1. Becauſe by the Writ of Error brought, the Scire facias againſt the baile is not ſuſpended, becauſe the Bayle is a diſtinct record; and upon this he cited the Caſe of the Ambaſſador of Spain againſt Captaine Gifford, which was, Trin. 14. Jac. That by the Writ of Error brought the baile was not ſuſpended, and he ſaid that it was ſo reſolved alſo in Goldſmith and Goodwins Caſe.

2. For the render of the principall to priſon, it is not good, becauſe it doth not appear upon Record: and for this he cited one Auſtin and Monkes Caſe, which was in 14. Jac. In Scire facias againſt the baile, it is pleaded that the principall had rendered himſelfe to priſon, and upon the matter it appeared, that the render was upon Candlemas day, which is not Dies juridicis; and ſo the Court this day had no power to commit him to priſon, for which the Plea was adjudged voyd.

3. For the death it is no Plea; the baile by it is not diſcharged, becauſe he hath not rendered himſelfe in due time: and for this he cited Juſtice Williams and Vaughans Caſe, which was Mich. 3. Jac. where in Scire facias againſt the baile they pleaded that the principall was dead, and thereupon the Plaintiff demurred, and in this Caſe two points were reſolved.

1. There was no Capias mentioned to have iſſued againſt the principall, and yet reſolved that a Scire facias would lye againſt the Baile.

2. That the Plea in Bar is not good, becauſe it may be that the principal dyed after the Capias awarded, or after the return thereof, becauſe it appeareth that there was once a default in the principal, and ſo the baile forfeited, and no Plea afterwards would diſcharge it, and upon this he put this Caſe:

A Priſoner eſcape out of Priſon, the Goaler makes freſh ſuit, and before he hath taken him, the Priſoner dies, this is the act of God, and yet becauſe it was once an eſcape, an Action of Eſcape lyes againſt the Goaler: Jermy for the Defendent; and he remembred a Caſe which was Hil: 20. Jac. Cadnor and Hilderſons Caſe, that by the Writ of Error, the bayle is ſuſpended. Nota, that it was agreed by the Court in this caſe, that by the Writ of Error brought in, the bayle was not diſcharged, becauſe it is incertain whether the Judgement ſhall be reverſed or not: Alſo it was agreed, that if the principal dies before a Capias awarded againſt him, that the bayle is diſcharged: It was alſo agreed by the Court, that the Plea was not double, for the firſt matters are but an inducement to the laſt; and yet by Doderidge, if ſeverall matters are pleaded in Bar, and there be not any dependency on them, the Plea is double, although none of them be materiall but one.

where a Plea is double, and where not.

Jones Juſtice cited one Hobs and Tadcaſters Caſe; which was 43. Eliz. in B. R. where after a Writ of Error brought, a Scire facias iſſued againſt the Bayle, and upon Nihil returned, the Plaintiff in the Scire facias brought in an Audita Querela, and there the matter came in queſtion, whether upon the Judgement the Principall ought preſently render himſelf to priſon, or that he ſhould ſtay until a Capias awarded againſt him, and there it was reſolved by Popham and all his Companions, that the Principal is not bound to render himſelfe to Priſon, untill a Capias be taken out; ſo that if he dies after the Judgement, and before the Capias awarded againſt him, the Bayle is diſcharged.

And in the principal Caſe here it was reſolved, that a Scire facias does not lye againſt the Bayle, until a Capias be awarded againſt the Principal: & becauſe no Capias in this caſe was awarded againſt the Principal (which could not be by reaſon of the Writ of Error) before his death. And alſo the Plaintiff in his Declaration ought to have averred, and ſhewn that the Capias was awarded

awarded againſt the Principal; for theſe reaſons Judgement was given quod quærens nil capiet per Billa.

The ſame Term in the ſame Court.

Reynor *verſus* Hallet.

IN an Action upon the Caſe for theſe words, viz. Reynor is a baſe Gentleman, he hath four children by his Servant Agnes, and he hath killed them all, or cauſed them to be killed; and after a verdict for the Plaintiff, it was moved in arreſt of Judgement by Jermy, that the words were not actionable:

Words. *Reynor is a baſe Gentleman, he hath four children by his ſervant Agnes, and he hath killed, or cauſed them to be killed.*

For 1. As to the firſt words, Baſe Gentleman, they are but words of choller.

2. The next words, He hath four Children by his ſervant Agnes, cannot be actionable, for although ſhe were once his ſervant, yet ſhe might be afterwards his Wife.

3. The Plaintiff hath averred in his Declaration, that he hath lived continently, and then he cannot have children by his ſervant Agnes, and then the words are not actionable.

And 4. For ſaying he hath killed them is not actionable, and upon this he cited one Snags Caſe, Co. lib. 4. who brought an Action for theſe words, Thou haſt killed thy Wife; and it appeared by the Declaration, that his Wife was alive, and therefore it was reſolved, that the words were not actionable.

And as to the laſt exception, it was ſaid by Aſhley Serjeant on the other ſide, that albeit the Plaintiff hath averred in his Declaration, that he lived continently, and ſo in a manner confeſſed that he had no children, this is but for the aggravation of the offence of the Defendant: as when an Action is brought for calling one Thiefe, he avers that he lived honeſtly, and yet the Action will lye. But I confeſſe if the Plaintiff had averred that he never had any child, then it would be like to Snags Caſe, Co. lib. 4. 16. a. and that the Action would not lye.

But in Anne Davyes Caſe, there ſhe averred, that ſhe was a Virgin of good fame, and free from all ſuſpition of incontinency; and the Defendant ſayd that a Grocer had got her with child: Owen Wards Caſe in Cook. Book of Entries hath the ſame Declaration as this, and it was the Preſident thereof. But Jermy moved another exception upon theſe words, he hath killed them, and doth not ſay Felony, which is not good, for he might kill them in execution of Juſtice, which is juſtifiable, Trin. 2. Jac. Willers Caſe in the Court, it was adjudged, that for theſe words, Thou haſt ſtollen a peece, and I will charge thee with Felony, an Action lies not, becauſe a peece is a word of doubtfull ſignification.

And Trin. 20. Jac. It was reſolved that theſe words (Agnes Knight is a Witch) were not Actinable: but it was anſwered of the other ſide, that upon the whole frame of theſe words, they cannot be intended but to be ſpoken malitiouſly, and there can be no pretence of lawfull killing of children: Doderidge, all the words joyned together are actionable; but theſe words only conſidered, he hath four children by his ſervant Agnes, are not Actionable, and albeit he doth not alledge it felony, yet this is a ſcandall, and good cauſe of Action. Jones agreed, and yet he conceived, that for ſaying ſingly, that one hath a Baſtard, an Action lies not, albeit the having of a Baſtard be puniſhable by the Statute of 18. Eliz. cap. 1. But by him he hath killed the King, ſhall

ſhall be taken in pejori ſenſu; otherwiſe it is, if the words of themſelves be indifferent, as (Pope) and this word ſhall not be the rather taken in pejori ſenſu, having relation to all the ſentence: for the contrariety of the Declaration, it ſeems to me, that the Declaration is good enough, but if one ſaith, Thou haſt killed J. S. where in truth, there never was ſuch a man, it is not actionable.

But here the Averment of the Plaintiff is more generall, Ubi re vera, he is not guilty or incontinent, which is a generall allegation: but if he had averred ubi re vera, he never had any child, there peradventure the Action would not lye, but here it will: Whitlock Juſtice agreed, and he ſayd that the firſt words, hath had four children by his Maid Agnes are actionable, and for the other matters they agreed, whereby Judgement was given for the Plaintiff.

The ſame Term in the ſame Court.

THis Term in the Common-place, Sargeant Hendon cited this Caſe to be adjudged 4. Jac. A Copy-holder made a Leaſe for yeares by Licenſe, and the Leſſee dyed, that this Leaſe ſhall not be accounted aſſets in the hands of the Executors, neither ſhall it be extended: But the Caſe was denyed by Juſtice Hutton and others, and that an Ejectione firmæ lies of ſuch a Leaſe.

But he ſaid, that if a Copy-holder makes a Leaſe for yeares by Licenſe of the Lord, and dyes without Heire, the years not expired, the Lord notwithſtanding this may enter, for the Eſtate out of which this Leaſe was derived is determined: But Yelverton Juſtice was contra, becauſe this Licenſe ſhall be taken as a confirmation of the Lord, and therefore the Leaſe ſhall be good againſt him, and there (as I heard) it was argued by all, that if a Copy-holder makes a Leaſe for a yeare, this is a Leaſe by the Common-Law, and not cuſtomary, and ſhall be counted aſſets in the hands of the Executors of the Leſſee.

The ſame Term, in the Kings Bench.

NOte, upon evidence to a Jury between Buffield and Byburo, the Caſe appeared to be this, upon a Deviſe with theſe words, I will and deviſe that A. and B. my Feoffees ſhall ſtand ſeiſed, and be ſeiſed to and of John Callis for life, the remainder &c. And the truth was that he had no Feoffees: and the opinion of the whole Court (nullo contradicente) was, that this is a good Deviſe to John Callis, by reaſon of the intention. 38. H. 8. Bro. Deviſ. 48. & 15. Eliz. Dyer 323. were urged for the proofe of it, and by Doderidge the Caſe of 15. Eliz. is more ſtrong then our Caſe is: Linyen made a Feoffment to his own uſe, and afterwards deviſed that his Feoffees ſhould be ſeiſed to the uſe of his Daughter A. who in truth was a Baſtard, and yet this is a good Deviſe of the Land by intention, for by no poſſibility they can be ſeiſed to his uſe.

Mich.

Mich. 2. Car. *Lemaſons* and *Dickſons* Caſe in the Kings Bench.

Trin. 2. Car. Roll. 1365.

THe Caſe was this, One Parcevall Sherwood was indebted to Suſan Clarke, who brought an Action of debt, by a Bill of Middleſex, which is in nature of a Writ of Treſpas againſt him, and Sherwood upon a mean Proces was arreſted by the Defendant (being Bayliff of the Liberty of White-Chappel) and being in his cuſtody, he ſuffered him to eſcape: Afterwards Suſan Clarke made the Plaintiff her Executor, and dyed, and then the Plaintiff brought an Action upon the Caſe againſt the Defendant upon the ſaid eſcape; and upon iſſue joyned, it was found for the Plaintiff.

And Calthrop of Councel with the Plaintiff, moved, that the Action will well lye, for the Teſtator himſelfe might have had either an Action of Debt, or upon the caſe upon the ſayd Eſcape, and therefore the Executor may have the ſame remedy, and that by the equity of the Statute of 4. E. 3. cap. 7. which gives an Action to Executors pro bonis aſportatis in vita Teſtatoris, And by 14. H. 7. 17. this Statute ſhall be taken by equity, and Adminiſtrators, who are in the ſame miſchiefe ſhall have the ſame remedy, albeit they be not named in the Statute, old Nat. Brevium 103. An Executor ſhall have a Quare impedit for a diſturbance made in vita Teſtator, and 7. H. 4. 6. and old Nat. Brev. 123. b. An Executor ſhall have an Ejectione firmæ of an ouſter made to the Teſtator, 17. E. 3. Executors 106. An Executor ſhall have a Replevin of Goods taken in vita Teſtatoris, and it hath been oftentimes reſolved, that an Executor ſhal have a Trover and Converſion of Goods taken and converted in vita Teſtator.

Doderidge, demanded of him the reaſon why an Action upon the Caſe upon an Eſcape in the life of the Teſtator, ſhould not lye againſt an Executor, to which he anſwered, becauſe it was a meer perſonall wrong. Doderidge, ſo is the wrong here; and he ſaid that an Executor cannot have an action Vi & armis, for a treſpas done in vita Teſtator, and in this caſe becauſe the eſcape was in vita Teſtator, it is a perſonall wrong to him, for which the Executor ſhall not have an action upon the caſe.

But it had been otherwiſe, if the eſcape had beene after the death of the Teſtator, and the Statute of 7. E. 3. doth not extend to it, becauſe this Statute is only for Goods, but I agree to the caſe of Trover and Converſion. Jones Juſtice, If this action upon the caſe will not lye by the Executor, it would be a miſchievous caſe, for as ſoon as the Creditor dies, the Goalor will and may ſuffer the Priſoner to eſcape, becauſe none can have an action againſt him, but as it appeareth by the Caſe of 15. Eliz. Dyer.

The caſe is as miſchievous for the Creditor, if the Goalor ſuffers an eſcape, and dyes, for there no action lyes againſt the Executors. And for the caſe of Quare impedit, I agree to it, and ſo it was reſolved in Brokesbyes Caſe, 31. Eliz. that an Executor ſhall have a Quare impedit for a diſturbance made in vita Teſtator, if the avoydance be a Chattel veſted, and therefore within the equity of the Statute, which gives an action de bonis Teſtator, and he was commanded to move it another time.

And at another day in Hillary Term, next after, Grigs ſaid for the Defendant, that the Executor cannot have this action for an eſcape in vita Teſtator, becauſe it is a meer perſonall action given to the Teſtator, & moritur cum perſona,

and cited 15. Eliz. Dyer, Whitakers Caſe, and that it is meerly perſonall appeareth by 10. Eliz. Dyer 271. Where an Executor ſhall not be charged with an eſcape in vita teſtator, generally, where not guilty is a good Plea, there an Action doth not lye for it againſt Executors. And this Caſe is not within the equity of the Statute of 4. E. 7.

But it hath been objected that an Ejectione firmæ is within the equity of this Statute for the Executors to have it 7. H. 4. 6. but the reaſon there, is, becauſe it is to recover the Term it ſelfe; and not damages only: and upon the ſame reaſon an Action of Covenant, upon a Covenant broken in the life of the Teſtator, is maintainable by an Executor, and that alſo is the reaſon of the Caſe of the Qua: impedit, becauſe there the preſentation is to be recorded: but in our Caſe damages only are to be recorded upon the eſcape, and ſo they are not alike.

2. The Arreſt here is upon mean Proces, and upon a Will of Middleſex, which is but in nature of a Treſpaſſe before Declaration, and I conceive that if one be taken by a Cap: ad ſatisfaciendum at the ſute of one, albeit the party at whoſe ſuit he is taken, dyes, yet he ſhall be detained in execution, but I conceive the Law to be otherwiſe upon a Cap: ad reſpondend: and albeit the Plaintiff ſaith, that the Arreſt was, ea intentione, to declare againſt him in an Action of Debt, yet an intent is a ſecret thing, and albeit the Executor repreſent the perſon of the Teſtator, yet he cannot follow it, and it is impoſſible to prove the intent.

Jermy for the Plaintiff ſaid, that there is a difference, where an Action is brought by, and where againſt Executors, and this appeareth by Littletons Caſe, that an Action of account doth not lye againſt Executors for want of privity as to that purpoſe, but it is cleer that account lies by Executors, becauſe this is a point of intereſt: And here in this Caſe, the Teſtator had intereſt in the body by the arreſt, and this appeareth in Hichcocks Caſe, cited in Hargraves Caſe in the Lord Cooks 5. Report, and by the Arreſt the body of the party is as a Chattel in the Teſtator: and he compared this to the caſe of 7. H. 4. 2. & 3. Fitzherberts Executors 52. An Executor ſhall have a raviſhment of ward for a taking in the time of the Teſtator.

And 7 H. 4. 6. and a Caſe cited by Hankford, that if one enter upon a Statute Merchant, who dyes, his Executor ſhall have an aſſize, and therefore I conceive, that if a Tenant by Elegit be ouſted and bring an Aſſize, if the Executors be ouſted again, he ſhall have a reditſeiſen upon the firſt ouſter, becauſe the Intereſt continues in him which was in the firſt Teſtator, and it is to be obſerved in our law, that the Law inlargeth it ſelfe to give to Executors the ſame remedy which the Teſtator had, and thereupon he cited Co. lib. 6. 80. a. & 3. Eliz. Dyer. 301.

And in our Caſe the body of the party was in the Teſtator, as a gage till appearance, ſo that it was not only a perſonall tort. for he had an intereſt, and this appeareth by Co. lib. 5. 27. by a Caſe put in Ruſſels Caſe there, and if the Executors ſhall not in this Caſe have an Action, it would be very miſchievous. for ſo the Goalor ſhall ſuffer eſcapes diſpuniſhable, 20. E. 3. Fitz. Executors 74.

But as to this reaſon it was anſwered by Jones Juſtice, that the ſame miſchiefe is of the other ſide, if the Goaler ſuffer an eſcape and dies, an Action lies not againſt his executors.

Calthrop on the ſame ſide cited F. N. B. 121. a. that a man condemned in debt, and impriſoned, if the Goalor ſuffer him to eſcape, the Party, or his Executor may have debt againſt the Goalor: And he ſaid, that at Common Law, Debt lay againſt a Goalor upon an eſcape, as appeares in Fitz. Debt 127. 38. H. C. placit 36. And if it were a debt in the Teſtator, then Executors may have an Action upon it.

But

But by Doderidge Juſtice in the ſaid caſe, debt lies not at Common-Law, for to what purpoſe was the Statute made? But for the point in Queſtion, his ſudden opinion, was, the Executor ſhall have this Action, and that it is within the equity of the Statute of 4. E. 3. for it is a wrong, although it were upon meane Proces, and the tort continues as to the Executor, for every thing which makes to the hinderance of the Execution of the will, is wrong to him, and the performance of Wills is much favoured, becauſe it is the laſt deſire of the Partie who is dead, and it is for the publick-weale, becauſe by this means debts ſhall be payd.

And many caſes are within the equity of the Statute, that are not within the letter, as thoſe Caſes which have been put, all which he agreed: Jones Juſtice on the ſudden was againſt it, and that this Caſe is not within the equity of the Statute of 4. E. 3.

There are divers Actions which are not helped by this Statute, as Treſpaſſe for cutting of Trees, Battery, and the like; for the Statute is, de bonis & Catallis aſportat in vita teſtator: An Executor ſhall have a Replevin of Goods taken in vita teſtator, for by this he recovers the thing it ſelfe, and ſhall have Detinue, but ſhall not have treſpaſſe, for he cannot punish the wrong done in the life of the Teſtator.

The Statute of 4. E. 3. is much inlarged by equity, as the caſes which have been put, and extend alſo to uſurpation in the life time of the Teſtator, as appears in Ruſſels Caſe Co. lib. 5. & 32. & 33. Eliz. in C. B. in the Biſhop of Chicheſters caſe, that if the Teſtator dyes within 6 months after the uſurpation, the Executor ſhall have a Quare impedit, And the Caſe of Trover and Converſion in vita Teſtator, was maintained by Executors, and it was ſo reſolved 41. and 42. Eliz. in the Counteſſe of Rutlands Caſe in both the Benches, becauſe this is in nature of a Writ of Detinue.

Now for the Caſe in queſtion, I conceive that it is not within the Statute of 4. E. 3. becauſe it is neither bona nor catalla. Whitlock Juſtice contra, and that this Statute is very much taken by equity, & præter literam, though not contra literam.

But Nota, that all agreed, if it were upon an eſcape after Judgement, that the Action would lie by the Executors - according to the Caſe of F. N. B. 121. a. But the principall Caſe was adjourned.

And afterwards Trin. 3. Car. It was argued again by Jermy for the Plaintiff, and the ſole point was, A man taken by latitat. and being in the cuſtody of the Sheriff eſcape, the Party at whoſe ſuit he was arreſted dies, whether his Executor ſhall have an Action upon the Caſe upon the Eſcape, and he conceived that he might.

It hath been objected, that it is a perſonall wrong, and as an Action doth not lye againſt Executors upon an Eſcape, in vita Teſtator, ſo not by Executors: To which I anſwer, that it is not meerly perſonall, but mixed with an intereſt.

At the Common-Law, an Executor could not have treſpas for Goods taken in vita Teſtator, but yet he ſhould have a Replevin, 34. E. 3. Fitz. Avoury 257. and Executors 106. So at Common-Law, a Succeſſor ſhould not have Treſpas, for Goods carried away in the life time of his Predeceſſor, but he ſhall have a Replevin, 9. H. 6. 25, but this was remedied by the Statute of Marlebridge cap. 28. and ſo upon the Statute of 4. E. 3. de bonis aſportat &c. Trover and Converſion hath beene adjudged within the ſaid Statute, for the Statute hath alwayes been liberally expounded. 7. H. 4. 2. Fitz, Executor 52. An Executor ſhall have raviſhment of Gard taken away in vita Teſtator, and alſo other Statutes which do not name Executors, have beene expounded to extend to them, as the Statute of 23. H. 8. which gives attaint.

3. Eliz.

Trin. 14 Jac. *Probe* and *Maynes* Caſe, if the party eſcape being arreſted upon mean Proces, the Sheriffe is not liable for the Eſcape, otherwiſe it upon an Execution.

3. Eliz. Dyer 201. Co. lib. 6. 8. Executors ſhall take benefit of the pardon of 43. Eliz. and 6. E. 6. Bendloes Reports (which is cited there) Executors ſhall have reſtitution upon the Statute of 21. H. 8. and Co. lib. 5. 31. and 27. Ruſſels Caſe, an Executor ſhall have Trover upon Goods loſt in vita Teſtatoris, and this is in manner and nature of a promiſe to have the party in Court at the day, and it is cleer, that upon an expreſſe Aſſumpſit to the Teſtator, an Executor ſhal have an action upon the Caſe, and it hath been in manner agreed by the Court, that if it had been an eſcape of one in execution, that the action would have lyen by the Executor: and I ſee no difference between that and our caſe. And it was adjourned.

The ſame Term in the ſame Court.

UPon an Information by Heath the Kings Attorney, againſt two men of the County of Huntington in the name of all the County, that they ought, and uſed to repaire the Bridge of S. Eedes in the County of Huntington, Iſſue was joyned by the County, whether they ought and uſed to repaire this Bridge; and the Attorney gave no evidence, but put it upon the other ſide, for he ſaid by the Statute of 22. H. 8. cap. if it doth not appeare that any particular perſon, or Towne ought to repaire a Bridge, by reaſon of Tenure, or otherwiſe, that then the County where this is, ought to repaire it.

But Nota, that the iſſue was, whether they ought to repaire the whole Bridge, and yet upon the evidence it appeared, that onely two Arches and a halfe of the Bridge was in the County of Huntington, and two Arches and a halfe in the County of Bedford, and the Jury found generally, that onely two Arches and a halfe of the Bridge were in the County of Huntington, and ſay nothing where the reſt was, for they could not find a thing in another County.

And alſo they found that the County of Huntington ought to repaire all, but not that they uſed to repaire it: And at another day Hedley Serjeant moved for the County, that the Verdict was not good, becauſe the iſſue was, whether they ought to repaire, and a tempore cujus contrarium &c. had repaired &c.

And the Jury hath found that they ought to repaire, which is but the halfe of the iſſue, and alſo they find that they ought to do it, which is a Queſtion in Law, and therefore void, 8. H. 6. 3. 4.

Secondly, the iſſue is, whether they ought to repair the Bridge, and the Jury hath found, that they ought to repair two Arches and a halfe onely, &c. and the Bridge is an entire thing.

The Attorney anſwered, that for the firſt exception the caſe of 27. Aſſ. Pl. 8. is againſt it.

And for the laſt the very caſe of 43 Aſſ. Pl. 37. is againſt it, and therefore the Court conceived the Verdict good, notwithſtanding theſe exceptions, Doderidge Juſtice, By the common Law before the Statute of 22. H. 8. if no man by reaſon of tenure or otherwiſe, ought to repaire a Bridge, the County ought to do it; like to the caſe of 8. E. 4. Fiſhers by the Law of Nations may dry their Nets upon the Land of any man.

The

The ſame Term in the ſame Court.

Doctor Cleland brought a Writ of error againſt Baldock, upon a Judgement given in where the Plaintiff declared that the Defendant, in conſideration that he would do all his commands, honeſtly and truly for the ſpace of a yeare, aſſumed to pay him 10 l. and further declared, that he had done all his honeſt and lawfull commands, and this promiſe being found by verdict, Judgement was given againſt Doctor Cleland, and thereupon he brought this Writ of error, and Greene aſſigned two errors. Intr. Hill. 22. Iac. Rot. 593.

1. The Aſſumpſit is, that he ſhall doe all his commands honeſtly and truly, and he hath declared that he hath done all his lawfull and honeſt commands, and he may honeſt commands, and yet not honeſtly.

2. It is ſaid that Jurator Aſſident dampna, and it is not ſaid occaſione tranſgreſſion. predict. and it is againſt all Preſidents: But Nota, that there were theſe words, ex hac parte oppoſita, and therefore the exceptions were diſallowed by the Court, and the firſt Judgement affirmed.

The ſame Term in the ſame Court.

Secheverel *verſus* Dale.

This Caſe was ſent out of Chancery to this Court to know the Law therein, and in Treſpas the caſe was this: Henry Secheverell, the Father ſeiſed in Fee, levied a Fine to A. and B. in Fee, to the uſe of himſelfe for life, abſque impetitione vaſti, with power to cut and carry away the trees, and to make Leaſes for 21 yeares, or three lives, the remainder to the uſe of John Secheverell his eldeſt Son for life, without impeachment of waſte, with the ſame powers.

Henry the Father made a Leaſe to one (under whom the Plaintiff claims) for three lives, rendring the ancient Rent, excepting all the trees (unleſſe thoſe which ſhall be for cropping, lopping, and fewell) Henry the Father dyes, John the Son in the next remainder cut certain trees Victorin, Secheverell who clayms by the leaſe made by the Father, brings treſpas, and two Queſtions were moved.

1. Whether Leſſee for life without impeachment of waſte, may make a Leaſe excepting the trees, and it was objected by the Councel of the Plaintiff, that he could not becauſe this ſecond Leaſe ariſeth out of the firſt fine, and out of the eſtate of the Conuſor: But the Court prima facie, was of opinion that he might well make ſuch a Leaſe with ſuch an exception, See Co. lib. 11. Lewys Bowls his Caſe, and Doctor and Student lib. 1. cap. 1. and by Doderidge Juſtice, the Leaſe ariſeth out of both the eſtates. Jones Juſtice, ſuppoſe the Leſſee abſq; impetitione vaſti, aſſigne over all his eſtate, might he cut the trees? and it was conceived that he might, for by Doderidge he hath power to diſpoſe of the trees, as it was reſolved in Lewys Bowls his caſe. Jones, he hath no propriety in the Trees, untill they be cut, Crew: ch: Juſtice, Admit a Stranger cut the trees, who ſhall have them? By all the Court the Leſſee without impeachment of waſte ſhall have them.

2. Point, Tenant for life without impeachment of waſte, with power to cut and carry away the trees, and make Leaſes for 21. years or three lives, the remainder for life to J. S. without impeachment of waſte, &c. Tenant for life makes a Leaſe for three lives, and dyes, whether he in remainder for life, without impeachment of waſte, with power to cut the trees, may cut the trees, and take them during the Leaſe for three lives, and the Court ſeemed to be of opinion that he might: And Leving of Councell with the Plaintiff, argued, that when tenant for life without impeachment of waſte with power to cut the trees, and to make Leaſes for 21. years or three lives, makes a Leaſe for three lives, excepting the trees, that this is a voyd exception, becauſe he hath no intereſt, but a bare Authority, 27. H. 6. Fitz. Waſt. 8. Statham tit. Waſt. 1. makes this a Quære (which Statham was once the owner of the Land in queſtion.) A man makes a Leaſe for life without impeachment of waſte, a Stranger cuts trees, the Leſſee brings treſpas, he ſhall recover no Damages for the value of the trees, becauſe the propriety belongs to him in the reverſion, & he may diſpoſe of them, Quære Dyer 284. Daunſley and Southwels Caſe, Co. lib. 11. Lewys Bowles caſe, that ſuch a Leſſee may take trees which are blown down, and 3. H. 6. 45. Mich 41. and 42. Eliz. C. B. Leechford againſt Sanders in an Action of waſte upon a Leaſe made to Sanders for life, with a proviſo that the Plaintiff might diſpoſe of the trees during the eſtate, and reſolved that the Action lies not, for notwithſtanding this power, the trees are demiſed to the Leſſee alſo, ſo here when the trees are excepted, he hath no intereſt, but only an authority.

2. The exception is voyd for another reaſon, becauſe when ſuch a Leſſee, makes ſuch a Leaſe, this is not his Leaſe, but it hath its operation out of the originall fine, and he who makes this hath but the nomination, and therefore cannot adde a condition or exception to it. And if the ſecond Leaſe ſhall have its being out of the eſtate of the Leſſee for life, then there ſhall be an uſe upon an uſe, as appears Co. lib. 1. 134. and that the Law will not allow. 15. H. 7. and Co. Lib. 1. Albanyes Caſe, If a man deviſe, that his Executors ſhall ſell his Land, they cannot adde a condition or exception to this ſale, as an attornment upon a condition ſubſequent is voyd, Co. lib. 2. Tookers caſe.

3. This caſe may be reſembled to the caſe of Copy-holds, which is in Co. lib. 8. 63. b. in Swaynes Caſe: If a Lord takes a Wife, and afterwards grants Lands by Copy, according to the cuſtome, and dyes, his Wife ſhall not be endowed of this Land, for albeit her title of Dower was before the Grant, yet the title of Copi-hold (which is the cuſtome) is elder then the title of Dower; ſo in our caſe, the title of the ſecond Leſſee is derived out of the eſtate of the Conuzées, and therefore ſhall not be clogg'd with the Exceptions of Leſſee for life, without impeachment of waſte.

4. This priviledge to cut the trees is annexed to the eſtates, and goes along with the eſtate, and therefore ſhall not begin before the Stranger be in poſſeſſion, 3. E. 3: 44. 45. Idles caſe 28. H. 8. Dyer 10. And it may be reſembled to the caſes of 16. E. 4. and 27. H. 8. Tenant in taile ſold the trees, if he dyes before the Party takes them, he ſhall never have them, becauſe he hath ſtayd out his time. But it may be objected that upon ſuch a Leaſe he may reſerve a rent, as it is in Whitlocks caſe Co. lib. 8. to which I will offer this difference, Leſſee for life, with power to make Leaſes for three lives, reſerving rent makes a Leaſe for three lives, reſerving rent, this reſervation is good, becauſe it is but a Declaration of the Leaſe, and of the rent; but if there were no ſuch clauſe of reſerving rent, then I conceive it were otherwiſe.

But admitting all this were againſt me, yet the juſtification of the Defendant is not good, for by the exception out of the exception, the Leſſor cannot

cannot take the benefit of the bodies of the trees, becauſe he will thereby deprive the Leſſee of the croppings and loppings &c. as in 28. H. 8. Dyer Maleverell and Spynkes caſe. Mylward of Lincolnes Inne for the Defendant. And firſt he conceived that the Leſſee for life without impeachment of waſte, might diſpoſe of the trees in the ſame manner as Tenant in fee might doe, with this difference, that the diſpoſall thereof ought to be in his life time, and ſo it is reſolved in Lewys Bowles caſe Co. lib. 11. 46.

2. The ſecond matter in the caſe is, whether the Leſſee for life, without impeachment of waſte &c. hath only an authority, or an intereſt in the trees, and I conceive that he hath an intereſt, for his power is to make Leaſes of it, or of any part for 21. years or 3. lives, and that the Conuzors ſhall be ſeized to the uſe of ſuch Leſſees, now when he makes a Leaſe excepting the trees, the trees are not demiſed, ſo that he remains ſtill tenant for life, without impeachment of waſte for the trees.

3. Excepting all Timber-trees, but for fencing, cropping, and lopping; it hath beene objected that this exception hath no forme: It is a generall rule. that if a man makes a Grant, and in the cloſe thereof except all that which was granted before, the exception is voyd: and this appears by 34. Aſſ. Pl. 11. A Mill was granted ſalvo ſtagno molendini: ſo here the laſt exception takes away all that which was granted before, 38. H. 6. 38. in a Quare impedit 28. H. 8. Dyer 19. by Mountague, the cropping and lopping of trees belong to the Leſſee, like to the Duke of Norfolks caſe in 12. H. 7. 25. and 13. H. 7. 13. and 18. E. 4. 14. and albeit every grant ſhall be taken moſt ſtrongly againſt the Grantor, yet it ſhall have a reaſonable intendment for the benefit of the Grantor, and this appeares by 7. E. 4. 22. 17. E. 3. 7. 9. E. 4. 2. 21. E. 3. 43. ſo here the Exception ſhall have a reaſonable intendment, that he ſhall onely have ſuch loppings and croppings as ſhall be beſtowed upon the Park, and no other. Doderidge Juſtice, I conceive that by the words without impeachment of waſte, he hath intereſt in the trees as long as the eſtate continues.

2. That when he makes a leaſe by the ſecond power given to him, this is derived out of the Fine, and ſhall be good againſt him in the remainder.

3. Becauſe he hath power to diſpoſe of the trees, I conceive, that when he makes a Leaſe, excepting the trees, this is a good exception, 24. Eliz. C. B. A man made a Leaſe for years, now he hath the waſt of the trees, if he aſſign over his eſtate excepting the trees, the exception is voyd, but in our caſe the Leſſee hath not parted with his whole eſtate.

4. So the ſole queſtion is, whether he in remainder may cut the trees during the eſtate of three lives made by Henry Secheverell, and he conceived that he might, and ſo concluded for the Defendant: Jones Juſtice agreed, that the Leſſee for life without impeachment of waſt, hath intereſt in the trees, but this intereſt is concomitant with his eſtate and determinable with it.

2. I conceive that the exception is good. Such things which a man hath by the Law he cannot reſign to himſelfe upon his aſſignment, as the cropping and lopping of trees, as if tenant in taile after poſſibility &c. (who is diſpuniſhable of waſt by freedome of the Law) aſſign over his eſtate, reſerving the trees, he cannot cut the trees, but here the Leſſee hath a larger liberty then the Law gives to him, and he by vertue of this may give away the trees; but I conceive that if he had aſſigned over all his eſtate, then he could not have excepted the trees, but here he hath not granted over all his eſtate, for he hath a remainder, and may have an eſtate in poſſeſſion afterwards. and upon this Leaſe for three lives hee may reſerve a rent to himſelfe.

2. I

3. I conceive, that this Leaſe is derived partly out of his owne eſtate, and hee hath not the meere nomination, and partly out of the firſt Fine, and therefore ſuch Leſſees ſhall be ſubject to all charges made by the Tenant for life who made the Leaſe, as Statutes, Recognizances, &c. to wit, during the life of the firſt tenant for life.

4. When he dyes who made the ſaid Leaſe for three lifes, whether he in remainder may cut the Trees during the ſaid Leaſe, and he conceived (yet not without ſome doubt) that he had no power during the lives of the ſayd Leſſees. Whitlock Juſtice agreed with the reſt, ſo that it was agreed by all:

1. That it is a good exception.

2. That the ſecond leaſe is drawn out of the Fine: And the queſtion now is, whether he in remainder without impeachment of waſte with power to cut the trees, hath power to cut them, during the lives of the ſaid three Leſſees, and the Councell was commanded to ſpeake to this point only upon another day.

The ſame Term in the ſame Court.

Foſter *and* Taylers *Caſe*.

ERror was brought upon a Judgement given in C. B. and after the Record was certified into this Court, the Common-pleas amended a raſure of the Record which was there, and now Bramſton Sergeant moved for the Def. that the Record might be amended here: Jones Juſtice, I doubt whether an inferior Court can amend after the Record is certified here, for then it is but a piece of Parchment with them: Bramſton, It is reſolved that it may in Blackamores caſe, Co. lib. 8. Doderidge, the doubt is, whether it may be amended after error aſſigned in the ſame Court, for this takes away the benefit of the Law from the Plaintiff in the Writ of error. Jones, at another day ſaid, that if in nullo eſt erratum had been pleaded, it could not have beene amended.

And as it is, it cannot be amended, becauſe now it is aſſigned for error; and the Plaintiffe was once intitled to his Writ of error, which ſhall not be taken away from him afterwards: and in 11. Jac. there was ſuch a caſe moved by Yelverton the Kings Solicitor, and agreed that it could not be amended.

And Paſch. 17. Jac. one Abbingtons caſe upon a raſure, as our caſe is, it was doubted whether it could be amended: and by Broom Secondary in the ſaid caſe, it was amended. Doderidge in this caſe, it may be amended, albeit it be after error brought, becauſe it is only the error of the Clerk, and it is amendable, although the error be aſſigned in the ſame point, and ſo was the opinion of the whole Court, and therefore it was amended.

The

The ſame Terme in the ſame Court.

W*Eld* of the Inner Temple moved for a Prohibition to the Eccleſiaſticall Court at *Worceſter*, and ſhewed for cauſe. 1. That the ſuit there was for money, which by the aſſent of the greater part of the Pariſhioners of D. was aſſeſſed upon the Plaintiffe for the reparations of the Church, to wit, for the recaſting of their Bels, the truth is that the charge was for the making of new Bels, where there were four before, whereby it appears that it is meerly matter of curioſity, and not of neceſſity, for which Pariſhioners ſhall not be liable to ſuch taxations, and he relied upon. 44 *E.* 3. 19. by *Finchden*. 2 The party there is overcharged, of which the Common *Law* ſhall Judge. 3 The Party hath alledged a Cuſtome that he and all thoſe who hath an eſtate in ſuch a Tenement, have uſed to pay but 11 s. for any reparation of the Church. But the Prohibition was denied, and by *Doderidge* in the Book of 44 *E.* 3. there was a By-law in the caſe to diſtrain, which is a thing meerly temporal, for which the Prohibition was granted *& per Curiam*, in this caſe the aſſeſſment by the major part of the Pariſhioners binds the party; albeit he aſſented not to it: and the Court ſeemed to be of Opinion that the Cuſtome was not reaſonable, becauſe it laid a burthen upon the reſt of the Pariſh. *Littleton* of Counſell of the other ſide, ſuppoſe the Church falls ſhall he pay but 11 s. *Whitlock*, If the Church falls, the Pariſhioners are not bound to build it up again, which was not denied by Juſtice *Jones*,

The ſame Term in the ſame Court.

A Prohibition was prayed, becauſe a perſon had libelled in the Eccleſiaſticall Court for the tenth part of a bargain of Sheep, which had depaſtured in the Pariſh from Michaelmas to Lady day: and the party furniſhed that he would pay the tenth of the Wooll of them, according to the cuſtome of the Pariſh. But the Prohibition was denyed, for as Doderidge Juſtice ſayd, by this way the perſon ſhall bee defrauded of all, if he ſhall not have his recompence, for now the Sheepe are gone to another Pariſh, and he cannot have any Wooll at this time, becauſe it was not the time of ſheering. Nota, per Whitlock, de animalibus, inutilibus, the Perſon ſhall have the tenth part of the bargain for depaſturing, as Horſes, Oxen, &c. but de Animalibus Utilibus, he ſhall have the Tith in ſpecie, as Cowes, Sheep, &c.

The ſame Term in the ſame Court.

UPon an Iſſue joyned in an Ejectione firmæ, it was found for the Plaintiff, and Lewknor moved in arreſt, &c. becauſe the Ejectione firmæ was de Meſſuagio five Tenemento, which is not good for the incertainty, and ſo it was reſolved 12. Jac. in this Court, and Ejectione firmæ lies not, De Tenemento Co. lib. 11. 54. Savils caſe, And it was reſolved in the Exchequer-chamber, that it lies not de pecia terræ; and in this Court in Rhetorick and Chappels Caſe it was reſolved that it lyes not De Meſſ. & Tenemento.

The ſame Term in the ſame Court.

Sir Robert Browne *againſt Sir* Robert Stroud.

IN debt upon an Obligation for performance of certain Covenants contained in certain Indentures made between the Parties aforeſaid, and the Covenant upon which the queſtion did ariſe was this: R. B. being ſeiſed of the Manor of Dale, & S.R. S. of the Manor of Sale, they exchanged the one for the other, and the Manor of R. B. being more worth then the Manor of R.S. R.S. covenanted to pay for the ſaid Manor 1200 l. and no time was limited when the money ſhould be payd, and the money not being payd within a year after, R. B. bargained and ſold the ſaid Manor by Deed indented, and inrolled to J. S. and his Heirs, and afterwards brought an Action of Debt againſt the ſaid R. S. for the ſaid 1200 l. who pleaded this matter in Bar, and Jermy argued for the Plaintiff, that this Plea ſhall not diſcharge the Defendant of the ſaid Covenant, for it is a reciprocall covenant, and he ought to ſue the other Party for the breach of the covenant; and it is a perfect bargain Dyer 30. 14. H. 8. 9. and here the Agreement is in writing, and it is good, albeit there be no limitation when the money ſhall be payd. 37. H. 6. 9. Calthrop for the Defendant, that the Action could not lye, for the contract is Executory, and therefore is not to pay the money till he hath the Manor, for the Covenant is that pro Maner. &c. he ſhould pay him 1200 l. and the word [pro] implies a condition and conſideration, and being excecutory on the one part, ſhall be alſo executory on the other part, 9. E. 4. 20. 21. Abridg. in Plowden 134. in Browning and Beſtons caſe 15. E. 4. 4. If A. grant to B. all the ancient Pale, and for them B. grants, that he will make new Pale for A. if B. cannot have the old Pale, he ſhall be excuſed from making the new Pale, for he cannot have the one without doing the other, 6. E. 6. Dyer 75. The contract was. pro 20. which makes a condition, 15. H. 7. 10. by Fineaux, If a man covenant with me to ſerve me for a yeare, and I covenant to give him 10 l. he ſhall have an Action for the 10 l. although hee do not ſerve me, otherwiſe if I covenant to give him 10 l. for his ſervice.

Alſo there is no time limited when the payment ſhall be made: true it is, that in Co. lib. 6. 30. when the act to be done is a tranſitory act, and no time is limited there, it ought to be done in convenient time, but the Law ſhall judge of the conveniency of this time, and the Law will never judge the time of payment to be before he hath the Manor, pro quo. &c.

In many caſes when no time is limited, the Law will appoint a time, as appeareth in 33. H. 6. 48. and Perkins 799. But now in our caſe the Law will never appoint that this money ſhall be payd, becauſe the other party hath diſabled himſelfe to perform his part; like to Sir Anthony Maines caſe Co. lib. 5. 21. Doderidge, The bargain is not perfect, becauſe no day of payment is limited, and the other ſhall have no Action of Debt for the money before he hath the Manor. Jones, If I covenant to make a Feoffment to J. S. and he covenant in conſideration of that Covenant to pay me 10 l. he ſhall have an Action of Debt againſt me, before he hath made the Feoffment.

And at another day in Trinity Term. 3. Car. Noy argued for the Plaintiff, and opened the caſe thus: Amongſt other Covenants in certain Indentures between them it was agreed, that whereas Sir R. Brown the Father was ſeiſed of the Manor of Gadmanton, with the Advowſon appendent, & Sir R. Stroud of the Manor of D, within the ſame County, that there ſhould be an exchange between them

them of the said Mannors, & because the Manno of Gadmaston was the better, Stroud covenanted with the Father and the Son to pay 1200 l. to the Father for the Demesnes of the said Manno and Advowson, and that at Michaelmas next insuing, there should be a mutuall entry into the said Mannors, and that in the mean time either of them should take the profits of their own Mānors, and that they should deliver each to other their evidences, and that Assurances should be made as Councel should advise; the Plaintiff declare, that they had performed all the Covenants which were to be performed on their part, and that the Defendant had not paid the 1200 l. and that thereupon this action of Covenant was brought.

The Defendant protestando that the Plaintiff had performed the Covenants, and had not produced their evidences, &c. for Plea saith, that the Plaintiff after Michaelmas bargained and sold the Manno of Gadmaston to J. S. and his Heirs, upon which the Plaintiff demurs, and he conceived that notwithstanding the sale after Mich. yet an action of Covenant lies for the 1200 l. but otherwise it had been if he had sold it before Mich. But it hath been objected that the money by the Covenant is to be payd pro the Manno, and therfore because the Defendant cannot have the Manno, he shall not pay the Money, and for this 9. E. 4. 20. and 24. E. 3. 21. have been cited, that [pro] implies a condition, as pro servitio pro maritagio, but these Cases do not resemble this case in reason, because the fact to be done here, rests upon an indifinite time, and the Defendant is to do the first Act, & the Defendant is bound to a certain time for the doing of this Act. For the first it is agreed, that the Defendant shall pay 1200 l. and the Plaintiff agrees to make Assurances for this Manno, and that the Assurances should be made as Councel should devise, and I conceive that the Defendant ought to procure the Councel to devise, for mutuall Assurances ought to be made, and either party ought to appoint what Assurances he would have, and the one ought not to be a Carver to the other, neither can one know what councel the other will have, and upon this reason is the case, 9. E. 4. 3. 4. and Plow. 15. b. the Case of the Well, it shall be weighed by him who is to have the profit, peradventure if it were in case of an Obligation to perform covenants, there he ought to procure the Counsel, for saving the penalty of the obligation; but it is otherwise here in case of a Covenant, Co. lib. 5. 22. b. 18. E. 3. 27. and 4. E. 3. 29. If a man be bound to be ready to levy a Fine such a day, yet the other ought to bring the Writ of Covenant against him before that day, for otherwise he cannot levy a fine;

But now the Law is altered, for now fines are levied, & Writs of Covenant are sued out afterwards, 17. E. 4. 2 per Pigot: If I am bound to you in 20 l. to enfeoff you at such a day of such Land, if you please to take the Feoffment, you are bound to let me know your pleasure, and here the Assurance is for the benefit of the Defendant, and he cited Co. lib. 5. 23. and 7. E. 4. 13.

2. For the time, this Assurance ought to be devised by Councel before Mich. or otherwise the Plaintiff shall be enforced to keep his Manno all his life, and shall be hindred of the sale of it for payment of his debts, or other necessaries whatsoever. And 17. E. 3. 1. liking ought to be shown in convenient time: And it appears by the Articles that the time intended was before Michaelmas, for every thing to be done by the Articles, was to be done before Michaelmas, Hill. 37. Eliz. Rot. 99. B. R. between Mills and Parsons. A man covenanted in consideration of 42 l. rent to be granted to him, payable at Mich. and Lady day, yearly, to levy a fine of a Manno to the use of &c. and the assurance of the Rent is not made before Michaelmas, and it was resolved that the Covenant was not performed, for the grant of the Rent ought to be before Mich. for otherwise he could not have the benefit intended, and cited also Dyer 347. and 20 Eliz. Dyer 361. and in this case there could be

no

no execution of other Articles if the Councel did not deviſe them before Mich.

But it hath been objected that the Plaintiff have not fully ſhown the performance of the Covenants of their part, but only by implication, albeit they have performed, and they have not averred that the Defendant hath not deviſed.

Anſw. To which I anſwer, that this is good enough; but where I covenant to do an act upon a future contingent act to be done by another, there I ought to ſhew it particularly, but otherwiſe in this Caſe, and this is for the benefit of the Defendant, and therefore he ought to ſhew it, and to this purpoſe is 3. E. 3, Fitz. Det. 157. and 18, E. 3. 4. &c. Jones Juſtice, Suppoſe the Defendant had demanded the aſſurance after Mich: and before the ſale what ſhall be done: Noy, nothing can be done after Michaelmas: and it was adjourned.

The ſame Term in the ſame Court.

Sanders *and others*, *verſus* Meryton.

IN an Action of Covenant the caſe was this, Amongſt other Covenants in a certain Indenture made between Sanders and others to the Leſſees, and his two Leſſors, the Leſſors covenant to diſcharge them of all Incumbrances done by them or any other perſon, and the Plaintiff aſſign for breach, that one of the Leſſors had made a Leaſe, and thereupon they brought this Action. And Goldſmith moved in arreſt of Judgement, that the breach was not well layd, becauſe it is onely layd to be done by one of them, and the Covenant is to diſcharge them of incumbrances done by them, which ſhall be intended joynt incumbrances. Doderidge Juſtice, the Covenant goes aſwell to Incumbrances done ſeverally as joyntly, for it is of all incumbrances done by them or any other perſon, and ſo was the opinion of the other Juſtices, and therefore the exception was over-ruled.

The ſame Term in the ſame Court.

Dickar *verſus* Moland.

IN Replevin, the caſe was thus: A man made a Feoffment to the uſe of himſelfe for life, the remainder to his Son in taile, which remainder over to the Defendant made conuſance as Bayliff to the Son for 4 s. Rent due to him before the ſayd time, in which, &c. to wit, 1. *Jan.* 18. *Jac.* which time was before the death of the Feoffor, whereupon it was moved for the Plaintiff, that the Avowry could not be good, and *Roll* argued for the Defendant, that it is good enough, for the *Ante predictum tempus quo* &c. is good enough, and the (*ſcilicet*) is voyd, for by this it appears that the Rent is due to another 20. *H.* 6. 15. And a (*ſcilicet*) is but an Expoſition of that which is once before, and it ſhall not deſtroy the precedent matter, but if it be contrary to it, it is voyd, *Co. lib.* 5. *Knights* caſe, A *ſcilicet* ſhall not make an alteration

alteration of that which went before, 15. *Jac. B. R. Deſmond* and *Johnſons* Caſe. In a Trover and Converſion the Plaintiffe declared that he was poſſeſſed of the ſaid goods. 1 *Jan.* 15. *Jac.* and that *Poſtea, ſcil.* the firſt day of *May* hee in the yeare aforeſaid loſt them, and that they came to the hands of the Defendant, and upon iſſue joyned, it was found for the Plaintiffe, and this was moved in arreſt of Judgement, and by the Court the (*ſcil.*) was agreed to be void, and the *Poſtea* good; and the like caſe was 17. *Jac.* in Debt. The ſecond Queſtion is, a man makes Conuſance for Rent for him in remainder in taile, and does not alledge the preciſe time when the Leſſee for life died, but onely that he died, and I conceive that it is well enough.

1. Becauſe an Avowry (which is in lieu of an action) is a reall action, and in reall actions no preciſe day need to be alledged.

2. Becauſe he avows for 4 s. rent due, and the arreare to the remainder, which implies that the Leſſee for life is dead; See 14. *Eliz. Dyer.* The caſe of a perſon, in one *Arundalls* caſe; a man was Leſſee for ninty years, if the Lady *Morley* ſhould ſo long live, in an action brought by him as Leſſee for years, in his Declaration he did not averre that the Lady *Morley* was alive, and yet awarded good, *Trin.* 12. *Jac.* in *Hord* and *Paramores* caſe, the defendant avowed as Heir of Sir *John Arundell*, and alledged no time incertaine of the death of Sir *John Arundell*, and yet awarded good for the reaſon aforeſaid, and therefore he prayed Judgment for the Avowant.

The ſame Terme in the ſame Court.

Jenkin verſus *Vivian.*

Intr. Hill. 1. Car. Rot. 331.

IN treſpas, Jermy for the Plaintiff took ſome exceptions to the Plea of the Defendant: 1. That the Defendant claim common in Trigemore Powze ratione Vicinagii, and doth not ſay, a tempore cujus contrarium memoria hominum non exiſtit. 2. The Defendant alledgeth that he and all his Occupiers of Down-cloſe had uſed to have common in the ſaid Trigemore Powze &c. whereas he ought to have ſhown what eſtate they had in Down-cloſe who have uſed to have this cõmon: Rol. there need no preſcriptiõ in this caſe, no more then in a cõmon appendant (which caſe of a cõmon appendãt was agreed by the whole Court) for it is mixt, 6. E. 4. 5 5. Co. lib. Intr. 625. tit. treſpas. For the 2. exception, I agree that if it be by way of preſcription, then it is not good, as it is alledged here, but if it be by way of cuſtome (as here it is) then it is good, for a cuſtome goes to Land, and a Preſcription to perſons, Hill. 11. Jac. Higgs brought an Action upon the Caſe for erecting of a new Mill, and alledged a Cuſtome, that he and all the Inhabitants &c. an exception was taken to it, and it was there ruled that it was good, becauſe alledged by way of cuſtome: Co. lib. 6. Gatewards caſe, and alſo Mich. 14. Jac. it may be alledged by way of cuſtom, as our caſe is, and 15. E. 4. when it is by way of diſcharge, it may be alledged in all Occupiers, Jermy for the Plaintiff, It cannot be a cuſtom here, for as it is in 23. Eliz. Dyer, A cuſtom cannot extend to a particular place, and this was agreed by the whole Court: But there is another exception, he claims common in Trigemore Powze for cattle levant and couchant in Down-cloſe, and does not aver, that theſe beaſts were levant and couchant upon Down-cloſe, and per totam Curiam, this ought to be averred, and it was alſo agreed that in this caſe he ought to have preſcribed: But for the exception of all occupiers it was doubted: but for the other exceptions Judgment was given for the Plaintiff.

The ſame Term in the ſame Court.

Chambers *Caſe*.

IT was ſaid in this caſe, that in debt upon a Recognizance acknowledged in Chancery, or in any other Court, the Defendant cannot demand Oyer of the condition, for the Recognizance is not in Court as an obligation is, when debt is brought upon it: But if Debt be brought upon a Recognizance acknowledged in this Court, then the Defendant may demand Oyer of the Recognizance.

The ſame Term in the ſame Court.

Harison *verſus* Errington.

IN Error to reverſe an Inditement of reſcous and Riot, taken in the County Palatine of Durham, Bankes aſſigned the Errors, whereof one was, there was a Warrant to three conjunctim, & divisim to arreſt the ſayd Harison, and two of them arreſt him, and therefore the Arreſt was not well done, for it ought to have been by one, or all three, and the reaſon is, becauſe it is a miniſteriall act, otherwiſe if it had been a judiciall act, 14. H. 4. 34.

2. The Inditement of Riot was againſt three, and the Jury found only one of them guilty of the Riot, this is a voyd verdict, for one alone cannot make a riot, like to the caſe in 11. H. 4. 2. Conſpiracy againſt two, and only one of them is found guilty, it is voyd, for one alone cannot conſpire. And at another day in the ſame Term Noy took other exceptions.

1. Becauſe the Inditement is Jurator, pro Domino Rege preſentant. &c. and doth not ſay, that 12. Jurors preſentant, and peradventure but 11. did preſent.

2. The names of the Jurors ought to have been certified, for peradventure they are not probe & legales homines, but Villains and Outlawes, 15. H. 4. 41.

3. It is found that Rolſon the Sheriff by vertue of a Writ directed to him, came, &c. and upon this reſcous was made by Harriſon &c. and it doth not appear what manner of Writ it was, ſcilicet, Elegit: Capias ad ſatisfaciend. on &c. and if there were no Writ there can be no reſcous, and albeit he had a Writ, yet if execution were done by vertue of another Writ which he had, the Party may diſobey it, as if upon an habere facias ſeiſinam, the Sheriff makes a Warrant as upon a Capias, the party is not bound to obey the Bayliffe, if hee bee not a Bayliffe knowne; but in caſe it appeares they were only Bayliffs pro hac Vice. Nota, that an Inditement before Coroners, which found that the Earl of B. was felo de ſe, was quaſht, becauſe it did not appear that it was per ſacramentum probor. & legal. hominum: And in the caſe of Sarum, this Term an Inditement was quaſht for the ſame cauſe.

The

The ſame Term in the ſame Court.

Rocheſter *verſus* Rickhouſe.

IN a writ of Error to reverſe a Judgement given in *Ejectione firmæ* in *Newcaſtle*, *Banks* aſſigned theſe errors.

1. The Plaintiffe declares of a Leaſe made *de Burg. ſine Tent.* which is not good, no more then in *Ejectione firmæ de Meſſ. ſive Tent.*

2. Becauſe the Judgement is not *quod capiatur* as it ought to be, becauſe it is *vi & armis.*

3. The judgement is *Ideo conceſſum eſt*, where it ought to be *conſideratus eſt*, and for theſe Errors the Judgement was reverſed: And the ſame day another Judgement between *Bell* and *Margery Strongury* was reverſed for the ſame cauſes.

The ſame Term in the ſame Court.

Petit *verſus* Robinſon.

IN Error to reverſe a Judgment given in C. B. in a Replevin, there Jermy for the Plaintiff aſſigned two Errors:

1. It apppears, that after the Writ and before the triall, it was coram Juſticiar. Dic. Domini Regis, and there was not any ſpeech of any King but of King James before, and there is no ſpeech of his demiſe, and therefore this ſhall be intended before the Juſtices of King James, which cannot be.

2. Becauſe the Niſi prius is certified to be tried before Franciſco Harvey, Mill. uno Juſticiar. &c. & the Poſtea returned, is before Franciſco Harvey Arm. argued, & ſo there was no ſuch Judge of Niſi prius as Francis Harvey: Banks for the Defendant, I conceive the firſt errors to be becauſe the adjournment was per br. Dom. Reg. and King James was named before, ſo that the objection may be, that it ſhall be intended the Writ of Adjournment of King James, which cannot be, but I conceive the Writ is generall, and ſhall not be intended, that it can be adjourned by the Kings Writ who was dead before, and the Clerk of the Aſſiſes who certified it, is bound to take notice of the Kings death, 37. H. 6. 28. and alſo the Record is not per br. Dic. Dom. Regis, but per br. Domini Regis, generally. And for the ſecond, I conceive it is no error, and if it be error, then if the Certificate be not according to the Copy, out of which the Clerke certifies, it ſhall be amended, 22. E. 4 22. 35. H. 6. 23. b. Co. lib. 8. 136. Blackmores caſe, which is a ſtronger caſe then this. But it hath been objected, that the Record is certified by the Juſtices, and now there can be no averment to the contrary; but I conceive that this Court may ſend to the Clark of the Aſſizes to amend it, and theſe objections were overruled in C. B. in the ſame caſe. Doderidge Juſtice, I conceive that notwithſtanding theſe exceptions the Judgement ought to be affirmed, for as to the firſt, the Court is bound to take notice of the demiſe of the King, and therefore it ſhall be intended the King that now is, and ſo the Writ of adiournment good enough, in Dyer. King Henry 8. made a Patent, and it was Ericus Dei gratia, &c. where it ſhould be Henricus, and yet the Patent good; ſo in a Writ to the Biſhop, the ſubſcription is, Epiſcop. Norw. this is good enough, for the Biſhop of Norwich is very well known. And for the other, I conceive it is not well alledged, becauſe it is not ſhowne whether he were a Knight at the time of the Certificate or not, and ſo it may well ſtand together, that he was a Knight, for he might be an Eſquire at the time of the triall, and before

the

the Record certified might be made Knight, Jones Juſtice to the ſame intent, and that we ought to take notice of the demiſe of the King, & therefore it ſhall be intended of the Writ of adjournment of the King which now is, and therefore it is no error, and yet if it were, it were amendable: Whitlock Juſtice agreed, and therefore the Judgement was affirmed by the whole Court.

The ſame Term in the ſame Court.

Crabbe *and his Wife verſus* Tooker.

IN Covenant betweene *Walter Crabbe* and *Anne* his Wife, againſt *Tooker*, the covenant upon which the breach was layd, was this, *Tooker* the Defendant covenanted with *Tooker* his Son, and *Anne Slade* (one of the Plaintiffs, whom he intended to marry) to give them their meat and drink in his houſe, and if any diſcontent ſhould happen between the Father and Son, ſo that he, and his Wife *Anne* ſhould diſagree to dwell with *Tooker* the Father, then they ſhould have 6. Beaſts gates, &c. *Tooker* the Son died, *Anne* diſagree to dwell with *Tooker* the Father, and marries with *Crabbe*, who with his Wife *Anne* brings this Action, and *Taylor* argued for the Plaintiff that the Action lies, for albeit the Covenant be in the conjunctive (if they diſagree) yet it ſhall have a diſjunctive interpretation, as where a man covenant to levy a fine to one and his heirs, if he dies the Covenantor may levy a fine to his Heirs, and *Hill* and *Granges* caſe in *Plow.* Two Tenants in common grant a rent, this ſhall be taken for ſeverall Rents, and *Co. lib.* 5. *Slingeſbyes* caſe, alſo the Wife is party to this covenant, and ſhe muſt either have remedy upon this covenant, after the death of her Husband, or not at all, for ſhe cannot diſagree in the life time of her Husband *per que*, &c.

And it was agreed on the other ſide, that there ought to be a diſlike between all joyntly, the Father, the Son, and the Wife: and now one of them being dead, the covenant is diſcharged, like to the caſe put in *Brudenels* caſe, *Co. lib.* 5. If Adminiſtration be grant during the minority of 3 if one of them dies, the adminiſtration ceaſeth, and 31. *Eliz. in C. B.* A Leaſe was made to three, and the Leſſor grants to them to be diſpuniſhable of Waſt *quamdiu cohabitarent*, one of them dies, and it was reſolved, that now they ſhall be liable to waſt. Alſo the Bar is not *bone*, for it is pleaded that *Diſcordia orta fuit*, and doth not ſhew what manner of diſcord this was, and therefore not good; as 3 H. 6. In Annuity brought *Pro concilio, &c.* he ought to ſhew for what manner of Councel it was: *Whitlock* Juſtice was of opinion for the Plaintiff, and that this Covenant extends to the Wife, and that upon equall conſtruction, becauſe it comes in place of the firſt Covenant, and this was intended for the benefit of the Wife, as well after the death of the Husband as before: *Jones* Juſtice was of the contrary opinion, and that the ſecond covenant was a ſeverall covenant from the firſt, and that the diſagreement is to be made by all three joyntly, and that when one dies the Covenant is gone, 2. *Eliz. Dyer*, A man will that *A. B.* and *C.* his Feoffees ſhall ſell his Land, *B.* dies, now the Authority is determined. The Lord *Gray* committed the cuſtody of his Son to four, one of them dies, the authority is gone, and in this caſe there is no matter of intereſt, but an agreement, and in ſuch a caſe as this is a Feme covert, hath a will, albeit ſhe hath no legall will; but in this caſe there ought to be a diſagreement of both, and there ought to be a diſlike of the Father alſo, and in the Declaration it is alſo ſaid, that ſhe diſagreed. *Doderidge* agreed with *Jones*, that the Declaration is not good, and that it is not warranted by the Covenant, and that the breach is not well aſſigned. The caſe is grounded upon the ſecond covenant which conſiſts upon a contingency which

which contingency is, if there happen any diſcord between the Father and the Son, &c. the words are joynt, and all ought to diſagree: True it is, that in ſome caſes a conjunctive ſhall be taken for a disjunctive, but this is according to the matter and circumſtances of the fact, but in our caſe it ſhall not be taken disjunctively. If the Father, the Son, and the Wife had diſagreed, then it is cleer that an Action of covenant lies, but this is *caſus omiſſus*, and no proviſion for it. Alſo it is only alledged in the Declaration, that ſhe diſagreed, whereas a mutuall diſagreement between all ought to be alledged, and therefore Judgement was given *Quod quærens mil. capiat per bellam.* But all agreed, that the Wife might have boarded with *Tooker* the Father, if ſhe would, but her new Husband could not.

ATthowe Sergeant took divers exceptions to an Inditement of forcible entry upon the Stat. of 8. H. 6. againſt Ployden and others for expelling one Syms from his Copi-hold, and the principall exception was, becauſe (diſſeiſivit) was not in the Inditement, and in truth it cannot, for albeit the Stat. of 21. Jac. cap. 15. gives power to Judges and Juſtices of Peace to give reſtitution of poſſeſſion to Tenants for yeares, and Copy-holders, in which there ſhal be an entry, or detainer by force, yet the Stat. does not give an Inditement of forcible entry of copy-hold. Noy, a Copy-holder ſhal now have an Inditement of forcible entry, but (diſſeiſivit) ſhal not be in it, for no Jury will find that becauſe it is not poſſible, becauſe a Copy-holder hath no Free-hold, and yet a Copy-holder ſhall have a Plaint in nature of an Aſſize againſt a ſtranger, but not againſt the Lord: And at laſt the opinion of the Court was, that the Inditement was good.

UPon a Capias directed to the Sheriff of London to take the body of J. S. the Capias was returnable die Jovis, which was the day of All-ſouls, and thereupon the Sheriff took the party, but he returned, that becauſe the return of the Writ was upon a day that was not Dies Juridicus, he ſuffered the party to go at large: And the return was holden inſufficient, for by Doderidge the Writ was good, and the taking and detaining of the party by vertue thereof was lawfull, but yet he could not have the party there at the ſayd day, and therefore the Sheriff was compelled to bring the party into Court, which the ſame day he did accordingly.

The ſame Term in the ſame Court.

A Man granted a Rent charge of 12 l. to one of his Sons out of the Manor of D. by Deed, and died, the Grantee loſt his Deed, the Land is extended to I. D. by vertue of a Recognizance acknowledged by the eldeſt Son of the Grantor, the Grantee ſue for his Annuity before the Councell of York to be relieved in equity, for that in reſpect of the loſſe of the Deed he could not have remedy at the common-Law, and J. D. the Conuzee obtained a prohibition out of this Court upon this ſurmize, that although the Councel of York ſhould make a Decree, that he ſhould pay the ſaid Annuity, yet it ſhould be no diſcharge for ſo much againſt the Conuzor, becauſe their Decree was no legall eviction. Now came Smith of the Temple, and prayed a Precedendo for the Grantee to the Councel of York, and the opinion of the whole Court was, that a Decree, there being no legall eviction, ſhall not be a diſcharge for ſo much againſt the Conuzor. Doderidge, the Grantee of the Rent-charge, having now loſt his Deed can have

no remedy in equity, for in this caſe Equitas ſequitur legem, and of the ſame opinion were Jones and Whitlock: but by Doderidge (which was not denied) if the Grantee had loſt the Deed by a caſuall loſſe, as by fire &c. in ſuch a caſe he ſhall have remedy in equity: and he ſayd, that in the beginning of King James, when Egerton was Lord Chancellor, there was ſuch a Caſe in Chancery: A Grantee of a rent-ſeck had ſeiſen of it, ſo that he might have an aſſize, and he deviſed it to J. S. the Deviſee ſued in Chancery to have his Rent and ſeizen of it, and he could have no remedy for it in Chancery: And this was one Malleryes caſe.

The ſame Term in the ſame Court.

ONe Hebborne was indited for ſtopping a way, &c. and it was moved that the inditement was inſufficient, becauſe it is not layd that it was communis via, but only that it was a way to the Church, and per Curiam, it was good enough, and by Jones Juſtice the Inditement is good enough, although there wants vi & armis, becauſe he who is ſuppoſed to ſtop the way, is owner of the Land.

The ſame Term in the ſame Court.

AN Action upon the Caſe, upon a promiſe was brought in the Town of *Northampton*, and the Conſideration alledged was, that if the Defendant here in the Writ of Errour, would diſcharge *Bagnot* of Execution, &c. that then the Plaintiff here in this Writ of Errour promiſed to pay him eleven pounds, and there the Defendant pleaded, *quod exoneravit illum de Executione relaxavit*, And *Rolſtred*, for the Plaintiffe moved this for Errours, that the Plaintiffe in the inferiour Court did not ſhew by what manner of releaſe it was, nor that it was by writing; for this being the Conſideration upon which the Action is grounded, ought to be put in certain, *Mich.* 15. *Iac. Staple* and *King*, Execution of a conſideration ought to be ſhown. 35 *H.* 6. 19. a diſcharge ought to be ſhown in certain, 22 E. 4. 43. the Lord *Liſles* Caſe, and *Mich.* 16. *Iac.* in this Court *Liverel* and *Rivets* Caſe (which was entred, *Trin.* 16. *Iac. Rot.* 322) in an Action upon the Caſe, upon a promiſe upon iſſue joyned, it was found for the Plaintiffe, and it was moved in arreſt of Judgement, becauſe the Conſideration was, that the Plaintiffe ſhould diſcharge one *Ogle*, and he declares, that he did diſcharge him, and thereupon he brought this Action, and becauſe he declared but generally, *quod exoneravit*, the Judgement for that very cauſe was ſtayed, and 36 *Eliz.* one covenanted to make an aſſurance, and pleaded generally that he had aſſured, and reſolved that it was not good, and in *Roſſe* and *Harvies* Caſe this Term (which was entred, *Trin.* 2 *Car. Rot.* 1408.) In Covenant the Defendant covenanted to give ſecurity, the Defendant pleaded that he offered ſecurity, and reſolved that it was not good, *per que &c. Jermy* for the Defendant, that the plea is good enough. for a Releaſe by *Perott* is ſufficient, I will remember but one book, upon which I will rely, 27. *H.* 8. 24. *Jordons* Caſe, in an Action upon the Caſe, the Defendant aſſumed to the Plaintiffe, that if the Plaintiffe would diſcharge *I. T.* of ſuch an Execution in which he is bound at the ſuit of the Plaintiffe, then if *I. T.* did not ſatisfie the Plaintiffe by ſuch a day, the Defendant would do it, and they were at Iſſue upon an *Aſſumpſit*, and there the Count is admitted good, and he need not plead it was by writing, becauſe the

the Diſcharge is good without writing, but it hath been reſolved, that if a man be in execution at my ſuit, and I go to the Sheriffe and command him to diſcharge the Party, this is a good Diſcharge, although it be by *Peroll*, *Jones*. If I ſay to the Sheriff, ſuffer the party to go at large, this is a good releaſe both to the party and to the Sheriffe, and by him (*relaxavit*) implies a ſufficient releaſe, and therefore the Plaintiffe in the Writ of Error ſhall be barred. And if a man be bound to ſave one harmleſſe in an Action brought upon this obligation, he pleads that he hath ſaved him harmleſſe, and ſhews not how, the Plaintiffe demurres generally, he ſhall not now take advantage of it, *Doderidge*. The Caſes put by *Bolſtred* are not to this purpoſe, for all thoſe caſes are of things incertaine, and he agreed that a releaſe by perol was ſufficient, and the caſe of 22. H. 8. is a ſtronger caſe then this is. *Whitlock* agreed alſo, and therefore *Doderidge* adviſed the Plaintiff to be ſatisfied, or otherwiſe they would affirm the firſt Judgement.

Trin 2. Car. in the Kings Bench.

Caryes *Caſe*.

IN Caryes caſe of Grayes Inn: (where theſe words were adjudged actionable, You a Councellor? a Foole, an Aſſe, a Hangman, a Councellor of Law, a Foole in the Profeſſion) it was ſaid by Jones Juſtice, it was not ſufficient to ſay, that he was eruditus in Lege, but he ought to ſay that he was Homo Conciliarius: and he ſaid that in maintainance againſt Boughton, it came in queſtion upon evidence to a Jury whether one who is a Barriſter may give advice, and it was ruled that he could not, albeit he had Letters Patents to inable him as fully as if he had been called to the Bar: and in Fleetwoods caſe adjudged, that theſe words (You the Kings Receiver? you are his Deceiver, are you not?) were actionable.

The ſame Term in the ſame Court.

SIr Tho. Savill was indited for breach of the peace within the Pallace, to wit, for aſſaulting Sir Fran: Wortley, and he pleaded his pardon, and Doderidge ſaid, that to ſtrike in the place was the loſſe of the right hand by the Law, and in this point our Law agrees with the Lawes of France and Spain, and all other Nations, for as the perſon of the King, ſo his Palace and courts of Juſtice are ſo ſacred, that ſuch contempts and affronts are judged worthy of ſuch puniſhments, and ſaid that the Book of 24. E. 3. 33. Fitzherbert Forfeiture, 22. (of which he would have Students to take notice) is that where one came into the Palace armed, and being brought to the Barre in his compleat armor, the cauſe was demanded, and he ſaid that it was in his own defence, being in fear of a great man then in Court, and he was committed to Priſon by the Court during the Kings pleaſure, and his Lands forfeited during his life. Vide for the like matter, 41. E. 3. Fitzh. Coron. 280. Dyer 188. 22. E. 3. 13.

Hillar.

Hillar. 2. Car. in the Kings Bench.

One Mathias Wheelhorse was indited at the Sessions of the Peace, holden in the Town of Northampton. quia Noctivagus, and because he divers dayes and nights did frequent the house of &c. which was within the liberties of Southampton, and was a suspected Bawdy-house: and Crawley Sergeant moved that this Inditement was insufficient for three reasons.

1. Because it does not appeare in the Inditement, that the party knew this to be a Bawdy-house.

2. Because it is not said that it was a Bawdy-house, but that it was suspected to be a Bawdy-house.

3. Because the Inditement is before Justices of Peace, Villæ de Northampt. and the house is infra libertates Villæ de Northampt. and it shall not be intended that the power of the Justices of Peace extend thither, and for it see Co. lib 5. 120. Longs case. 13. H.7. 33. 34.22. H.7. Kelleway 89. Co. lib. 9. Mackaleys case: And the Court gave no opinion concerning the exceptions: But another thing was moved, to wit, that one could not be indited before Justices of peace for being Noctivagus, but this is to be inquired of in the Leet, and in this the whole Court was against him, for it is a misdemeanor, and it is contrary to the Statute of Winchester, and every one may arrest him: And at another day he moved this last exception again, and sayd that the Justices of Peace have no power to fine men that are noctivagant, yet true it is, that a Court-Leet hath such a power, Rastol. Leet 2. and true it is also, (as it is in 4.H.7.1.2.) that every one may arrest a Night-walker, but there it is said that if he appeareth to be a man of good fame, the party who arrests him ought to let him go at large; and the Inditement here is only that he was Noctivagus, & it appears not that he is a suspicious Night-walker: & by Doderidge & Whitlock Justices (only present) by the Common Law every man may arrest him who is Noctivagus, and the word (Noctivagus) implies that he was a common Night-walker, and they sayd that Justices of peace by their Commission have power to take such Inditements, for it is of ill behaviour, and albeit the Inditement were nought for the other exceptions, yet being good in this, it shall not be quasht, and therefore Judgement was given upon it, and the party fined 40 s.

The same Term in the same Court.

Sparrow *versus* Sherwood.

In Trover and Conversion of two loads of Fitches of certain Land &c. The Defendant justifie by the command of Hare, to whom part of the Land belongs; and to one Pots, to whom another part in right of the Lady his Wife belongs, and shews that part of the Fitches did grow upon the Land of one, and part upon the Land of the other, and upon this the Plaintiff demurs:

1. Because he justifies by the command of two generally, and he cannot justifie upon the Land of the one by the command of the other, and therefore he ought to have alledged severall commands.

2. Because he does not shew particularly upon whose Land the Fitches grew, but that part grew upon the Land of one, and part upon the Land of the other, which is incertain.

3. Because

3. Because the Wife of Pots is called by the name of Lady, and the Wife of an Esquire cannot be a Lady: Doderidge and Whitlock onely present, for the first were of opinion, that it was good enough; for although it were a joynt command, yet the parties commanding having several titles, it shall be taken as severall commands, reddendo singula singulis: and for the third it is good enough, being in a Plea, otherwise, if it had been in a Writ: But for the second Exception, the bar is not good enough, because incertain, so that although upon other Exceptions moved by the Defendant, the Replication of the Plaintiff was not good, yet the Defendants Bar being ill, the Plaintiff shall have Judgement upon the Declaration: And the Plaintiff had Judgement accordingly.

The same Term in the same Court

Risley *versus* Hains.

IN an Action upon the Case, upon an *assumpsit*, the Plaintiffe declared upon the Sale of several parcells of Tobacco, to wit, for one parcell so much, for another parcell so much, and so forward, and in the Conclusion he saith, *quæ quidem separales summa in toto se attingunt*, to 55.l. which (being computed) is lesse then the particulars, and upon *non assumpsit* it was found for the Plaintiffe, and now *Andrewes* moved in arrest of Judgement, for that the particulars, and the summing up of them differs, and this being in a Declaration (which ought to contain truth) it is not good, and so there appears to be no cause of action, 35.*H.*8. *Dyer* 55. And *Grices* Case, in the very point *Mich.* 17. *Jac.* in this Court, but by *Jones* and *Whitlock* Justices onely present, the Declaration is good enough, for there is a particular promise for every parcell, and the summing up of particulars is only surplusage, and officious nesse of the Clark, therefore the Judgement was affirmed: And *nota*, that *Jones* said *obiter* in this Case, that upon a contract, the Party to whom payment is to be made, need not make request, and afterwards it was agreed by the whole Court, that it should be amended, otherwise it had been more.

The same Term in the same Court.

A Great multitude of Welsh-men were Indited for the death of a man, by an Inquisition taken before the Coroner in the County of Mountgomery in Wales, and Littleton of Councel with the Welsh-men took some Exceptions to the Inquisition: as, 1. That the Coroner cannot take any Inquest, unlesse it be super visum corporis, and to this purpose he cited Britton, 6. Ric. 2. Coron. 107. 21. E. 4. 70. 2. Ric. 3. 2. This also is the reason that, if a man drown himselfe, and cannot be found, the Coroner cannot enquire of the death of this man: but for the King to have a forfeiture of his Goods, an Inquisition ought to be taken before the Justices of Peace, as it was resolved in this Court, Trin. 13. Jac. upon which the first exception was, that the Inquisition was taken at D. in the time of King James, super visum corporis, in D. in the time of this King, and for this he cited two presidents out of Cookes Booke of Entryes: Another Exception was, because

the Inquiſition was per Sacramentum probor. & legal. hominum Com. predict. whereas by the Stat. of 4. E. 1. this inqueſt ought to be by men of the four Towns next adjoyning, and this ought to appear in the Inditement alſo Hill. 10. Jac. Rot. 3. Co. lib. Intr. 354. And day was given to the Attorney General, to maintain this Inquiſition. But afterwards Paſch. 3. Car. the Inditement was quaſhed, eſpecially for the firſt exception.

The ſame Term in the ſame Court.

King *verſus* Merrick.

IN an Action upon the Caſe for theſe words, I charge you King with Felony, and you Conſtable (innendo Thomas Legat) to apprehend him: And a verdict for the Plaintiff. It was moved in arreſt of Judgement by Bacon, that the words are not actionable: The firſt words are not, becauſe they are not an expreſſe affirmation, and for this he cited Mich. 11. Jac. in this Court Powel and Bands caſe, where an action was brought for theſe words, I have arreſted Powel of Felony, for ſtealing ſheep of mine, and adjudged not actionable.

Alſo the Plaintiff did not ſhew in his Declaration what kinde of felony this was, and it may be ſuch a felony for which an Action will not lie; for there are divers kinds of felony, and a Mayhem is one kind, as appears in 40. Aſſ. Pl. 4. 6. H. 7. 1 and in this caſe it ſhall be taken in mitiori ſenſu, and it ſhall not be intended ſuch a felony for which he may be hanged: If one charge another with felony, becauſe he hath committed a Mayhem, it is clear that an action will not lye.

And the other words, (I charge you Conſtable to apprehend him) are not actionable, and the words are onely ſpoken to the Plaintiff: Alſo the words are layd to be ſpoken in London, and it appears that the Conſtable was of a Town in Norfolk, who cannot apprehend any one in London. Earle for the Plaintiff. It hath been argued that the words are not actionable, becauſe felony is a generall word and contains in it ſelfe a mayhem alſo; But I conceive that in this caſe felony ſhall be taken according to the general and common acceptation, which is ſuch a Felony for which a man may loſe his life, and for this he cited Co. lib. 4. 15. b. Yeomans charged Hext, for my ground in Allerton Hext ſeeks my life, and if I could find John Silver, I do not doubt but within two dayes to arreſt him upon ſuſpition of Felony: and it was adjudged that for the laſt words the Action lies, becauſe he ſhall be impriſoned for ſuſpition of felony, and felony is there taken according to the common acceptation of the word.

It hath been objected that there is no expreſſe affirmation of the Felony, but I conceive that there is, 39. Eliz. Action was brought for theſe words; I will call him in queſtion for poyſoning my Aunt, and adjudged that it lyes, and Mich. 37. and 38. Eliz. Woodroſe and Vaughans caſe for theſe words: I did not know Mr. Woodroſe was your Brother, I will prove him perjured, or elſe I will bear his charges: and adjudged actionable. And Hill. 44. Eliz. Rot. 351. This man (innendo John Latham) hath cut my Wives purſe, and his Father knowing of it received it of him, and the Money and Rings therein, and therefore I charge him of flat Felony: and reſolved that for theſe words, (did cut my Wife's purſe) no action lies, for the cutting of ones purſe only is not felony, unleſſe it be taken from the perſon; and to receive one is not Felony, but reſolved that the laſt words were actionable, and then

it

it was agreed, that if one say, that I. S. did see such a one that had committed Felony, and did suffer him to slip away, I charge him of Felony, these words are not actionable, and Mich. 20. Jac. in this Court that these words (beare witnesse, I arrest him of felony) are actionable, and therefore he prayed Judgement for the Plaintiff. Doderidge Justice, the words are not actionable: And Hexts case comes not to this case, for there by the word (Felony) it was manifest what Felony he intended by the circumstances of the speech, to wit, that he ment such felony, for which he might lose his life; but the words here being generall of Felony, it may be intended as well of a Mayhem as of any other Felony; for in an appeal of Mayhem, he is arraigned as Felo Domini Regis 40. Ass. and the other case of 44 Eliz. I do arrest him of that Felony, is not consonant with the reason of this case, for there by the arrest, his liberty is taken away, but in this case there is no restraint, and it is very hard to make these cases agree together, for words are as variable as the faces of men &c. Jones Justice agreed, and he took it for a generall rule, that where words carry a double sense, and there is nothing to guide the sense more one way then another, there the words are not actionable, for finis est legis dirimire lites: And therefore if one satty of another, that he hath the Pox, because the sense is ambiguous, it shall be interpreted in mitiori sensu, and therefore the words are not actionable, so if one sayes of another, that he hath stolen his Apples, or his Corn, because they may be Apples from the tree, or Corn in the field, the taking whereof is no felony: but it was adjudged in the Common-Pleas, when I was there, that these words viz. Thou art a Thief, and hast stolen my Corn, are actionable, by reason of the addition of the word Thiefe.

So that the speaking of words of a double sense are not actionable, unlesse ex antecedentibus, or consequentibus, it can be collected that the words were spoken in pejori sensu: Then the words in this case (I charge you with Felony) peradventure intend such a Felony, for which he shall recover damages only, which is Mayhem, and therefore no action will lie. These words (Thou art forsworn) are not actionable, because forswearing may be in ordinary communication, or in a Court of Justice, and it shall be taken in mitiori sensu: but if he sayes, Thou art forsworn in a Court of Record, it is actionable, and if in this case he had charged him with Felony, and sayd further that he had stolen, &c. they would have been actionable, but here he only charges him with Felony, which is an ambiguous word; and also it is no direct affirmation, and therefore not actionable, and Judgement was given Quod quærens nil capiat per Billam.

The same Term in the same Court.

Goods *Case*.

Good and his Wife brought a Writ of Error upon a Judgement, given in the Court of the Castle of *Windsor*, in an Action of Debt there, which was entered *Trin. Mich.* 2 *Car. Rot.* 119. 120. and two Errors were assigned. 1. Because the Judgement there is given in these words, *ideo consideratum ad judicatum, & assessum est*, whereas it ought to be onely by the word *consideratum*, and the Judgement being the act of the Court, the Law is precise in it, and therefore it hath been resolved, that a Judgement given by the word (*concessum*) is not good, but it ought to be by the word (*consideratum*)

2. The

2. The coſts *ex incremento*, are not ſaid to be given, *ad petitionem quærentis*, as it ought to be, for *beneficium nemini obtruditur*, and therefore it hath been reſolved in this Court, that an alien born ſhall not have *medietatem linguæ*, if he does not requeſt it, and as to this it was anſwered of the other ſide, that coſts ought alwayes to be aſſeſſed *ex petitione quærentis*, and albeit here the requeſt of the Plaintiff was not preciſely put to increaſe of the coſts, yet at the beginning of the Judgement it is ſaid, *Ideo ad petitionem quærentis conſideratum. &c.* And that coſts ſhall be given *ex incremento*, ſo that this requeſt goes to all the Sentence, and by the unanimous opinion of all the Court, the Judgement was reverſed for both the Errourrs, for 1. *Ideo conſiderat. adjudicat. &c.* is not good, the Judgement being the Act of the Court, and the Law hath appointed in what words it ſhall be given, and if other words ſhould be ſuffered, great incertainty and confuſion would enſue, and needleſſe verboſity is the mother of difficulty. 2. The increaſe of coſts ought to be given *ad petitionem quærentis*, and the words (*ad petitionem quærentis*) being miſplaced, will not ſupply this defect, and Dammages *ex incremento* is alwayes given *ad petitionem quærent.* for as *Bracton* ſaith, *Omne judicium eſt trinus actus trium perſonarum, judicis, actoris, & rei*, and if in this caſe, the uſuall form ſhould not be obſerved, all would be in a confuſion, and in as much as the words are miſplaced, it is as if they had not been put in at all, and therefore void, like to a caſe put in *Walſinghams* caſe in *Plowden*, where an averrement miſplaced, is, as if there were none: In this caſe the Judgement was reverſed, and *Trin.* 3 *Car. in B. B. intr. Hill* 2 *Car. Rot* 849. a judgement was reverſed, becauſe it was *Ideo conceſſum & conſideratum eſt.*

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